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HIGH COURT OF CHANCERY.

REPORTS OF CASES

DECIDED

IN THE

HIGH COURT OF CHANCERY

OF

MARYLAND.

HON. JOHN JOHNSON, CHANCELLOR.

VOL. III.

CONTAINING CASES FROM THE YEAR 1847 TO 1853.

ANNAPOLIS:
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1853.

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A LIST

OF THE

CHANCELLORS OF THE STATE OF MARYLAND.

RICHARD SPRIGG.
Appointed by the General Assembly, 3d of April, 1777; resigned, March, 1778.

JOHN ROGERS.
Appointed by the Governor and Council, 20th of March, 1778; died, 1789.

ROBERT HANSON HARRISON.
Appointed 1st of October, 1789; declined accepting.

ALEXANDER CONTEE HANSON.
Appointed 3d of October, 1789; died, 1806.

GABRIEL DUVALL.
Appointed 20th of January, 1806; declined accepting.

ROBERT SMITH.
Appointed 23d of January, 1806; declined accepting.

WILLIAM KILTY.
Appointed 26th of January, 1806; died, 1821.

JOHN JOHNSON.
Appointed 15th of October, 1821; died, 1824.

THEODORICK BLAND.
Appointed 16th of August, 1824; died, 1846.

JOHN JOHNSON.
Appointed 21st of December, 1846.

PREFACE TO VOL. III.

THE Legislature of Maryland has manifested its high appreciation of the labors of Chancellor Johnson, by subscribing for one hundred and ninety copies of these Reports, as will appear by the following Act of Assembly of January Session, 1853, chap. 263. The same appropriation was made, also by a nearly unanimous vote, for the first and second volumes of this work, at the Session of 1852.

"An Act to purchase Copies of the Third Volume of Maryland Chancery Decisions, for the use of the Courts of each County, and for the benefit of the State Library. Passed May 24, 1853.

"SECT. 1. Be it enacted by the General Assembly of Maryland, That the State Librarian is hereby authorized to purchase one hundred and ninety copies of the third volume of the Maryland Chancery Decisions, published by James Wingate, to be distributed by said Librarian as the Reports of the Court of Appeals are distributed.

"SECT. 2. And be it enacted, That said volume of Maryland Chancery Decisions shall not contain less than six hundred pages, and that the price, to the State, of said volume, shall be five dollars per volume.

"SECT. 3. And be it enacted, That upon the presentation of the receipt of the State Librarian, that said volumes have been delivered to the State Library, the Comptroller of the Treasury shall issue his warrant to the Treasurer to pay said James Wingate for the said Maryland Chancery Decisions, at the rate of five dollars for each and every volume purchased.

"SECT. 4. And be it enacted, That the sum of nine hundred and fifty dollars is hereby appropriated from the State Treasury, for the purchase of the third volume of said Maryland Chancery Decisions, to be paid out of any unappropriated money in the State Treasury.

"SECT. 5. And be it enacted, That this Act shall take effect from and after the date of its passage."

The fourth volume of the "Maryland Chancery Decisions" will complete the Reports of the Decisions of the present Chancellor of Maryland.

JAMES WINGATE.

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CASES

IN THE

HIGH COURT OF CHANCERY.

JEREMIAH DUCKER,
vs.
GEORGE G. BELT.

SEPTEMBER TERM, 1851.

[CHANCERY PRACTICE.]

THE complainant, the holder of a mortgage from the defendant, dated the 9th of August, 1842, obtained a decree upon his bill filed on the 22d of May, 1847, against the mortgagor alone for a sale of the mortgaged property, and became the purchaser thereof at the sale made on the 7th of August, 1847. The Auditor, by his report of the 4th of December, 1847, applied $4483 85, of the proceeds to complainant's mortgage, $1274 15 to an elder judgment against the defendant, and $480 55 to W's judgment rendered in September, 1845, and the balance of $319 95 to the mortgagor. This report was confirmed on the 26th of July, 1848. On the 10th of September following, K., the holder of a mortgage on the same property, dated the 23d of January, 1843, filed his petition stating the existence of his mortgage and claiming the surplus proceeds after payment of liens prior to his own, and praying that the order ratifying the Auditor's report might be rescinded. The 9th of October was fixed by order of the court for hearing this petition upon notice to the parties interested. E., the assignee of W's judgment, answered this petition, denying knowledge of the mortgage and requiring proof of the allegations thereof. The petitioner was not present on the day fixed for the hearing, no proof had been taken by him, and no excuse offered for his failure so to do. The petition was then dismissed by an order passed on the 10th of October, 1849. Afterwards on the 5th of November, 1849, K. filed a second petition, alleging that he had no notice of the answer of E. to his former petition, and, therefore, did not know what evidence he would be required to produce, and praying that he might be allowed now to produce evidence in support of his claim.

HELD—

That it was the duty of the petitioner to have been present on the day fixed for the hearing of his first petition to take care of his rights, and having omitted this duty, he has no right now to call upon the court a second time to relieve him ; and that it would be establishing a most loose and inconvenient system of practice to grant his present application, and again open the order confirming the Auditor's report.

The court cannot revoke the order passed on the 26th of July, upon a petition not filed until the 5th of November, because the July term had then expired, and the decree of the 26th of that month must be regarded as enrolled and no longer liable to be heard upon petition.

If a decree be enrolled so that the cause cannot be reheard upon petition, there is no remedy but by a bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter discovered since.

The right of a junior mortgagee to come in upon the surplus proceeds of sale when the mortgaged property has been sold under a decree of this court, to satisfy an elder mortgage, after payment of such elder mortgage is well settled.

On the 31st of January, 1851, after the second petition of K. was dismissed, the complainant in the cause, by whom the property was purchased in 1847, filed a petition, asking that the order of the 26th of July, 1849, confirming the Auditor's report, might be revoked, and the money appropriated to pay K's mortgage, upon the ground, that he, as purchaser, was entitled to have the title disincumbered, and insisting that in his character of purchaser he cannot be regarded as a party to the proceedings, and, therefore, the orders and decrees of the court therein are not binding upon him. HELD—

That this application is not warranted by the decision of the Court of Appeals in the case of *Glenn* vs. *Clapp*, 11 *Gill & Johns.*, 1, and that the petitioner being the complainant, and having had a large proportion of the purchase money applied to the payment of his own claim, he was affected *with notice* of the appropriation of a portion to the payment of W's judgment, and, therefore, cannot escape the consequences of his remissness in suffering upwards of three years to elapse before bringing forward his objection.

The rights of all incumbrancers, or persons having liens existing at the commencement of a suit for a foreclosure and sale, whether subsequent or prior in date to the plaintiff's mortgage, who are not made parties to the suit, cannot be impaired by the decree.

[The facts of the case are fully stated in the opinions, the first of which was delivered on the 14th of February, 1850, as follows :]

THE CHANCELLOR :

On the 4th of December, 1847, the Auditor made his report in this case, distributing the proceeds of sale after the payment of the trustee's commissions and expenses. *First*, To the satisfaction of the mortgage debt due the complainant. *Secondly*,

To the payment of a judgment in favor of Herman H. Perry, against the mortgagor, rendered at January term, 1840, of Baltimore County Court. *Thirdly*, To the payment of a similar judgment in favor of the State of Maryland, use of Samuel Wilson, rendered at September term 1845, leaving a residue of $319 95, which was assigned to the defendant, Belt.

Exceptions were filed to this report, on the 23d of June, 1848, on behalf of G. L. Dulaney and James M. Buchanan, in which among other objections against its ratification, the existence of an intervening mortgage to the trustees of the poor of Baltimore county is urged. This mortgage, the exception states, is elder in date than the judgment in favor of Wilson—is of the property sold under the decree in this cause, and of an amount exceeding the surplus proceeds of sale. The mortgage, however, was not exhibited or filed in the cause, nor was anything stated, or shown, by which the interest of the exceptants was manifested. There was not then, nor is there now, any thing in the cause to show that the parties by whom the exceptions were filed had any interest whatever, in the fund to be distributed.

In this state of the case the cause was laid before the Chancellor during the July term, 1849, and on the 26th of the month, after close of the sittings, an order was passed, ratifying the report of the Auditor, directing the proceeds to be applied accordingly and overruling the exceptions. On the 10th of September following, a petition was filed in the cause, by John King, president of the board of trustees for the poor of Baltimore county, stating the existence of the prior mortgage, to secure the payment of the debt due from the defendant, Belt, to them, and other circumstances which it was supposed gave them a title to have the surplus proceeds of sale appropriated to their payment, and praying that the order of the 26th of July, 1849, ratifying the report of the Auditor, might be rescinded, that the petitioner might be allowed to file his claim under the mortgage, and that the trustees for the sale of the property might, in the meantime, be prohibited from paying over the money to Wilson, &c.

The court on the same day passed an order fixing the 9th of

the then ensuing month of October for hearing the matter of the petition, directing the trustees to retain the money, and providing that a copy of the petition, and of the order, should be served on them, and Wilson and Hugh W. Evans, to whom the judgment in favor of Wilson had been assigned, on or before the 25th of the same month of September.

On the 24th of that month, Evans filed his answer to that petition, in which he denied all knowledge of the mortgage, and of the debt thereby intended to be secured, and insisted that if there was any such mortgage, it should have been previously exhibited in the cause. This answer also denied, or declared the respondent's entire ignorance of the grounds of equity contained in the petition, and the cause being submitted to the Chancellor, in pursuance to the order of the 10th of September preceding, on the petition and answer without proof on either side, an order was passed on the 10th of October, 1849, rescinding the said order of the 10th of September, and dismissing the petition upon which it was passed.

Afterwards, on the 5th of November, 1849, a second petition was filed by the same party, in which, among other things, he alleges, that he had no notice of the answer filed by Evans to his former petition, or of the contents thereof, and, therefore, did not know what evidence it would be necessary for him to produce in support of his said petition, and praying that he may be permitted to produce evidence of the allegations of his said former petition, and in support of his claim. The petition also states the death of the said George G. Belt, who it appears died on the 8th of May, 1848, and his administrator was made a party.

Upon this petition, which was not verified by the affidavit of the party, an order was passed on the 6th of November, 1849, fixing the 6th of the following December for the hearing thereof. And an answer having been filed thereto by Evans, the case now is presented for consideration, upon all the proceedings in the cause, together with certain affidavits which it is agreed by the parties shall be read as if taken under the order of the court. A written argument has been submitted by the counsel for Mr. Evans, and the petitioner's counsel has been heard.

The right of a junior mortgagee to come in upon the surplus proceeds of sale when the mortgaged property has been sold under a decree of this court, to satisfy an elder mortgage, after the payment of such elder mortgage is believed to be well settled. Such right appears to be recognized by the Court of Appeals in the case of *Lee* vs. *Ad'rs of Boteler & Belt*, 12 *Gill & Johns.*, 323, and as the surplus in such a case represents the equity of redemption of the mortgagor, and is the very security pledged to the second mortgagee, no good reason is seen why he may not come and take it rather than permit it to be handed over by the court to the mortgagor. This, moreover, is the precise application which the purchaser of the property might insist upon, because in case the second mortgagee, is not made a party to the bill his rights could not be bound by the decree, and he might possibly disturb the title of the purchaser by subsequent proceeding.

This is not like the case recently decided in which the petition of a party representing himself to be a junior incumbrancer, praying to be made a party to the bill by a prior mortgagee, was dismissed upon the ground that he had no right thus to interfere. Because here there has been a sale, the claim of the elder mortgagee satisfied, and a surplus remains, being the value of the equity of redemption, upon which the party having a claim to that equity must be entitled to put his hands.

But in this case, a portion of this surplus, was appropriated by the Auditor, as far back as the 4th of December, 1847, to the payment of Wilson's judgment, which Belt, the mortgagor, admitted to be due, and consented should be allowed, according to its priority. This audit was confirmed on the 26th of July, 1849, and the question now is, whether this court can or ought, under the circumstances, to rescind the order of confirmation, and direct the money to be paid to the petitioner. The order of the 10th of September, 1849, passed upon his own application, fixed the 9th of October following for the hearing of his petition. The answer of Evans was put in on the 24th of the same month of September, by which the petitioner was put to the proof of his claim, and of all the grounds upon which he rested

his equity to the interposition of the court. The day of hearing came, but the petitioner was neither prepared with his proofs nor with any excuse for their non-production, and his petition and the answer thereto being submitted by Evans, under and according to the course of the court, the petition was dismissed.

The petitioner now alleges, that he did not know that Evans' answer had been filed, and consequently did not know what proofs would be required of him. But is this a reason why he was not here, on the 9th of October last, the day fixed upon his own petition, for the hearing of the application? If he had been present and stated sufficient grounds, the court would have given him further time to produce his evidence. This, however, he did not do, and offers as an excuse for not being prepared with his proofs, that he did not know that Evans had filed an answer.

It is quite probable that he did not know that Evans had filed an answer. But he certainly did know that the 9th of October, 1849, was the day fixed for the hearing of his own petition, and I conceive it would be establishing a most loose and inconvenient system of practice, to grant the present application, and open a second time the order of the 26th of July last. It was said by the Court of Appeals, in the case of *Gott & Wilson* vs. *Carr*, 6 *Gill & Johns.*, 309, "that a suitor in court is bound to be present in person, or by attorney, to take care of his rights, and attend to their due prosecution, and cannot make the omission to perform this duty the foundation of an injunction." So here it seems to me especially to have been the duty of this petitioner to have been present on the 9th of October last, to take care of his rights, and that having omitted this duty, he has no right now to call upon the court a second time to relieve him, upon the ground that he was ignorant of the proceedings which had been had in the cause after he filed his petition. If he had been present, he would have known what had been done in the cause, and what steps it was necessary for him to take for the protection of his rights.

There are strong equities upon both sides. The petitioner, as the elder incumbrancer, certainly had the first lien on the fund, and Evans, as a surety, is to be favorably considered.

There is, moreover, another very formidable if not insuperable objection to granting the relief prayed by this petition. It prays not only that the order of the 10th of October last may be rescinded, but all other orders passed since the death of Belt, including, of course, the order of the 26th of July last. The object, then, is to get rid of the order of the 26th of July, 1849, ratifying and confirming the report of the Auditor, and directing the proceeds of sale to be applied accordingly. And in truth, unless the petitioner can procure a revocation of that order, his purpose cannot be accomplished. But can this court now revoke that order upon the petition filed on the 5th of November last? The July term had then expired, and the decree of the 26th of that month must be regarded as enrolled, and no longer to be reheard upon petition. *Berch et al.* vs. *Scott*, 1 *Gill & Johns.*, 393. In that case the Court of Appeals say, "if a decree be obtained and enrolled, so that the cause cannot be reheard upon petition, there is no remedy but by a bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter discovered since." It does not appear to me to be a sufficient answer to this objection, to say that the petition of the 10th of September last, was filed before the preceding July term had closed, because that petition was dismissed and finally disposed of by the order of the 10th of the following October. The petition, therefore, filed on the 5th of November, 1849, can derive no aid from that filed on the 10th of the preceding September, and we must deal with the last petition now, irrespective of that which was filed previously, and if this be so, the error, if one was committed, in the passage of the order of the 26th of July last, cannot be corrected by this form of proceeding. It appears by the report of the Auditor in this cause, that after satisfying the several claims filed and allowed, there remained a residue of $319 95, which was assigned to the mortgagor, Belt, and nothing in this opinion, or in the order about to be passed, is to be understood as deciding that the petitioner, King, may not, by a proper proceeding, claim and recover that balance. The opinion and order of the court has reference ex-

clusively to the rights of the petitioner as against Wilson's judgment.

It is, thereupon, ordered, this 14th day of February, 1850, that the petition of John King, filed in this cause on the 5th day of November, 1849, be, and the same is hereby, dismissed, with costs to be taxed by the Register.

[The second opinion was delivered on the 1st of October, 1851, as follows :]

THE CHANCELLOR:

In the opinion of this court delivered on the 14th of February, 1850, the facts of the case are stated down to that period, and it, of course, is unnecessary to recapitulate them.

Upon those facts, the court come to the conclusion that it had no power to open and rescind the order of the 20th of July, 1849, upon the petition of John King, filed on the 5th of November of the same year, the object of which, was to apply a portion of the money raised by a sale of the property, in the proceedings mentioned, in a different way from the appropriation directed by that order.

The order of February, 1850, stands unreversed, no attempt having been made to bring it before a superior court for examination, and we are now engaged upon a petition filed on the 31st of January, 1851, nearly twelve months afterwards, in substantially re-trying the same question, in the same cause, because it is quite apparent if the present attempt is successful, the object proposed by the former petition will be accomplished.

The petition of November, 1849, was filed by King, the second mortgagee, claiming that the surplus proceeds of sale, after satisfying the elder mortgage, should be applied to the payment of his mortgage, in preference to a junior judgment in favor of the state, use of Samuel Wilson, to which, by the report of the Auditor and the court's order of the 26th of July, 1849, such surplus had been in part applied, and this petition, for the reasons stated in the former opinion, was dismissed.

The present petition was filed on the 31st of January, 1851,

by the elder mortgagee, the party by whom the original bill in the cause was filed, by whom the decree was obtained, and by whom the property was purchased in August, 1847. He asks that the order of the 26th of July, 1849, confirming the report of the Auditor, and directing the application of the purchase money, may be revoked, and the money appropriated to pay the second mortgage, upon the ground that as the purchaser he is entitled to have the title disincumbered.

This application is not warranted by what was said by the Court of Appeals in the case of *Glenn* vs. *Clapp*, 11 *Gill & Johns.*, 1. The object here is not to rescind the sale and have the purchase money restored, upon the ground that the purchaser has been, or is exposed to be, disturbed in his possession by one having clear title to the estate, which title was entirely unknown to the purchaser at the time of the sale. He does not ask in his petition that the sale may be rescinded, nor does he say that the incumbrance which he wishes to have removed was unknown to him when he purchased, nor that his title as purchaser, has been, or is, exposed to be, disturbed by one having a clear title to the estate, nor does he say, nor could he say, that there is, or is likely to be, a total failure of consideration. All that he says is, that "to make his title as a purchaser more secure, he is entitled to have said sum" (meaning the amount applied to the payment of Wilson's judgment) "applied to the lien of King, the second mortgagee."

The case then is simply this: the present petitioner, Jeremiah Ducker, holding a mortgage executed by George Gordon Belt, dated the 9th of August, 1842, filed a bill on the 22nd of May, 1847, against the mortgagor alone, for the sale of the mortgaged premises, to pay his debt. When this bill was filed, there existed a second mortgage, that to King, dated the 23d of January, 1843, duly executed and enrolled, of which Ducker had constructive, if not actual, notice, but he did not in his bill make this second mortgagee a party. He obtained a decree, and at the sale of the property, made on the 7th of August, 1847, he became the purchaser, and the sale was duly ratified and confirmed. The Auditor, by his report, dated and

filed on the 4th of December, 1847, made a distribution of the proceeds of the sale, by which, after appropriating $4483 85 to the payment of the complainant's own mortgage, and $1274 15 to the payment of an elder judgment, he applied $480 55 to Wilson's judgment, leaving a balance of $319 95, which was assigned to the mortgagor. This audit was ratified and confirmed on the 26th of July, 1849, being more than nineteen months afterwards, the purchaser interposing no objection, nor did he, in fact, make any objection until the 31st of January, 1851, more than three years from the filing of the Auditor's report.

The ground now taken is, that this petitioner though he was the complainant in the original bill, and though by the report of the Auditor, and the order of the court thereupon of the 26th of July, 1849, he received a large proportion of the proceeds of the sale of the mortgaged premises, he being himself the purchaser thereof, yet that inasmuch as he cannot, in his capacity *of purchaser*, be regarded as a party to the proceedings, the orders and decrees of the court therein, are not binding upon him. It was said by the late Chancellor in *Binney* vs. *Cose*, 2 *Bland*, 108, that "where the legal capacities of the parties are different, such capacities must be considered as if they were several persons." This may be so, and I have no doubt is so in many cases, in which questions arise as to whether proper parties are before the court. But the question here is not whether this petitioner was a party to the proceedings as a purchaser, but whether being a party, as the complainant, and having had a large proportion of the purchase money applied to the payment of his own claims, he is not affected *with notice* of the appropriation of a portion of the proceeds to the payment of Wilson's judgment. And if he had such notice, I do not see how he can escape the consequences of his remissness in suffering upwards of three years to elapse before he brings forward his objection. He insists that no harm would be done to the holder of Wilson's judgment by this, because he had no legal or equitable claim to any portion of the proceeds of the sales, and that if his application is granted, it will be

only giving the money to those who are entitled to it. But how can we know that no harm will result to Wilson from this negligence. Belt, the mortgagor, is now dead, and it may very well be, if this petitioner had asserted his rights earlier, that the judgment creditor might have recovered his claim in some other way. Besides, this judgment is now held by Evans, the assignee of Wilson, and how is it possible to say to what extent his rights and remedies over against those who may be ulteriorly responsible to him, may be jeoparded by this delay. It is said, and cases have been cited in support of the position, that to a bill for a foreclosure and sale, all incumbrancers, or persons having liens, existing at the commencement of the suit, subsequent as well as prior in date to the plaintiff's mortgage, must be made parties, otherwise they will not be bound by the decree. Such was the judgment of Chancellor Kent, in the case of *Haines* vs. *Beach*, 3 *Johns. Ch. Rep.*, 459, and I presume it can scarcely be questioned, that the rights of such persons, not made parties, cannot be impaired by the decree. But that is not the question involved in this case upon this petition. The mortgagee here thought fit to file his bill without making the junior incumbrancers parties, though as to the mortgage to King, he had constructive notice by the enrollment, and then having obtained a decree, and himself become the purchaser of the property, he claims to have the surplus applied in satisfaction of King's mortgage, which King himself, by his negligence, had forfeited his title to have done. For these reasons, in addition to those stated in the opinion of February, 1840, I am of opinion the relief asked for by this petition cannot be granted.

GRAFTON L. DULANEY, for Petitioners.
J. M. CAMPBELL, for Evans and Wilson.

THOMAS D. HUNT ET AL.
vs.
JOHN STULL.
} JULY TERM, 1849.

[CONSTRUCTION OF THE WORDS "MORE OR LESS" IN A CONTRACT FOR THE SALE OF LAND.]

The words "more or less," or other equivalent words, used in contracts and conveyances, should be construed to qualify the representation of quantity, in such a manner, that if made in good faith, neither party should be entitled to any relief, on account of a deficiency or a surplus.

In a contract for the sale of land for a gross sum, in which, by the introduction of the words "more or less," the representation of quantity is qualified, the number of acres is to be considered as merely descriptive, and not of its essence, and, in the absence of fraud, deficiency or surplus in the quantity of land, will not avail to vacate the contract.

There may be, however, cases in which the deficiency, from its magnitude, would raise a presumption of fraud, imposition or mistake, and in such cases, the words "more or less," would not be permitted to stand in the way of relief.

[The bill in this case was filed for the purpose of enforcing a contract for the sale of lands. A decree for a sale was passed by default on the 30th of May, 1849, and after an advertisement of sale by the trustee, a petition was filed by the defendant, the vendee, to suspend the proceedings of the trustee, vacate the decree, and for leave to file his answer, charging misrepresentation by the vendor as to the number of acres in the tract of land sold him, or that the decree might be allowed to stand as a security for the performance of the contract, after such deductions from the purchase money as the petitioner might be entitled to, on account of deficiency in the quantity of land bought. The matter of the petition was set down for hearing, and having been argued on notes by the respective counsel, the following opinion was delivered.]

THE CHANCELLOR:

On the thirtieth of May last, a decree passed for the sale of a parcel of land, for the payment of the purchase money therefor, due from the defendant to the plaintiffs, upon allegations

and proofs of the embarrassed pecuniary condition of the vendee, showing the vendors to be without adequate remedy at law.

The contract of sale bears date on the 8th of October, 1847. The property sold is described as a tract of land called "Mother's Care," containing one hundred and seventy-three acres, "more or less;" of which possession was to be given on the first day of January, 1848, and for which the purchaser agreed to pay the gross sum of $2300. Of this sum $500 were to be paid on the day possession was to be delivered, and the residue in periodical instalments, of which, one for $600 had become due and remained unpaid when the bill was filed.

After the decree, and after the trustee appointed to make the sale, had advertised the property, to wit, on the 3d of July last, the vendee filed his petition in this court, in which, after offering some excuse for not making his defence at the proper time, he alleges, that while the negotiation for the purchase was going on, and at the time of the contract, the vendors represented that the number of acres specified in the contract was shown to be the true number by an old plat, but that subsequently, and after the first payment had been made and possession delivered, the vendors caused a survey of the land to be made, by which it appeared that it only contained one hundred and forty-five acres, one rood and thirty-four perches.

Upon this statement, the petitioner prayed that the trustee might be prohibited from selling, the decree vacated, and the petitioner allowed to file his answer to the bill, or that if the decree should not be vacated, it should only be allowed to stand as a security for the performance by the petitioner of his contract of purchase, after making such deductions from the purchase money as he might appear to be entitled to.

The court upon this petition, ordered the sale to be suspended, and that the matter thereof stand for hearing, on a day limited, with the usual direction for serving notice on the opposite party, and with the further direction, that the instalment of the purchase money then due should be brought into court.

The party who made the contract of sale, for himself and the other vendors, has answered the petition, and he being the

only party alleged to have any knowledge of the circumstances relied on by the petitioner, and upon which the charge of misrepresentation is founded, the absence of the answers of the other vendors furnishes no sufficient reason for postponing a decision of the question in controversy.

In the answer which has been filed, all misrepresentation, in reference to the quantity of land, or in any other respect, is expressly denied, and the ground taken, that the sale was for a gross sum, and not by the acre, and that the survey of which the petition speaks, was not made to ascertain the number of acres, but for the purpose of ascertaining the lines and courses of the land. The answer, however, admits that in the course of the conversation of the respondent with the agent of the vendee, with whom the contract was made, relative to the land, the agent inquired if he, respondent, knew the quantity of land, that the respondent told him he did not, he had never seen it surveyed, but had heard his brother say the old plat called for one hundred and seventy-three acres. The counsel for the petitioner, in his written argument says, that if he is allowed an opportunity, he will prove that on examination, no such plat as that spoken of has been found, and he insists, that such an answer as was given to the question put by the agent of the vendee, would make it fraudulent to enforce the contract. It appears by the written contract in this case that the land was not sold for a stipulated price per acre, but for a gross sum, and there is no pretence, if the rules of evidence would allow the contrary to be shown, that the written contract does not express the intentions of the contracting parties. And although it may be perfectly true and such is believed to be the law, that, even in the case of a sale for a gross sum, fraud or wilful misrepresentation of the quantity, would afford ground of relief, yet if the representation of the quantity be mere matter of description, and not of the essence of the contract, as where there are qualifying words, as "more or less" or "by estimation," the vendee must be understood as assuming upon himself the risk of the quantity.

The language of Mr. Justice Story in 4 *Mason*, 417, adopted

and approved of by the court of appeals in *Jones* vs. *Plater*, 2 *Gill*, 125, must be regarded as establishing the law here to be "that the words more or less, or other equivalent words, used in contracts and conveyances should be construed, to qualify the representation of quantity in such a manner, that if made, in good faith, neither party should be entitled to any relief, on account of a deficiency or surplus."

In this case there is not only the absence of any fraudulent representation of quantity, which, (the sale being for a gross sum, and the language of the contract showing that the statement of the quantity was but descriptive, and not of its essence,) would be necessary to entitle the vendee to relief, but, in point of fact, no representation of quantity, except the statement in the contract, is shown at all.

The petitioner's counsel, in his argument, does not say, or offer himself prepared to prove, that any actual representation of quantity was made, but that the answer which the vendor admits he gave, when interrogated as to the number of acres, amounts to a representation, and would make it improper to enforce the agreement. Such, however, is very far from being my understanding of the answer. He says he was asked if he knew the quantity of land. He replied that he did not—he had never seen it surveyed, but that he had heard his brother say, that the old plat called for one hundred and seventy-three acres. If there is any misrepresentation here, it is in misstating what he had heard his brother say. He distinctly says, that he did not himself know the number of acres, but that he heard his brother say, that an old plat called for so many. Now it is not pretended that he never did hear his brother make this statement, and no proof has been, and perhaps from the very nature of the statement, could be offered to contradict him. Here, then, is a case in which a gross sum was stipulated to be paid, and in which, looking to the introduction of the words "more or less," the representation in the contract of quantity is qualified, so that the number of acres is to be considered as merely descriptive, and not of its essence, and in which there was not only no fraudulent misrepresentation of quantity outside of the

contract, but no representation at all, and yet it is contended the vendee is entitled to an allowance for a deficiency.

In the case of *Jones* vs. *Plater*, 2 *Gill*, 125, the sale was not for a round sum, but for a specific sum by the acre, and yet the court decided, that by the force of the words "more or less," the parties were to be understood as intending that the land to be paid for, was the number of acres mentioned in the contract, and not that which it should be found to contain upon measurement. And they say, that unless the words in question lead to such a conclusion, "they are useless and insensible."

There may no doubt be cases in which the deficiency, from its magnitude, would raise the presumption of fraud, imposition, or mistake, and in such cases, the words "more or less" would not be permitted to stand in the way of relief. But this certainly is not a case of that description, and, as I think, the case in 4 *Mason*, 417, and *Jones* vs. *Plater* in 2 *Gill*, 125, are authorities settling the law against the petitioner, I shall dismiss his petition, and revoke the order suspending the authority of the trustee under the decree.

This order is passed upon the assumption that the plat spoken of, cannot be found, and, therefore, an order to take proof, would only lead to unnecessary delay and expense.

GEORGE VICKERS, for Complainant.
CORNELIUS MCLEAN, for Defendant and Petitioner.

[The order dismissing the petition in this case, was affirmed on appeal.]

JOHN GLENN, TRUSTEE OF CHARLES GROVER,
vs.
CHARLES GROVER AND MATTHEW McCOLM.

JULY TERM, 1850.

[DEEDS FRAUDULENT AS TO CREDITORS.]

A conveyance, even if for a valuable consideration, is not, under the statute of 13*th Elizabeth*, valid in point of law, from that circumstance alone. It must also be *bona fide*, for if it be with intent to defraud, or defeat creditors, it will be void, though there may be a valuable consideration.

The fraudulent intent must be shown. It is not a thing to be presumed, but must be proved, and by evidence sufficient for the purpose.

[The proceedings in this cause originated in the equity side of Baltimore County Court on the 15th of May, 1841. The object of the bill, which was filed by the complainant Glenn, as the permanent trustee of the defendant, Charles Grover, an insolvent debtor, and as administrator of Eaton R. Partridge, in behalf of himself as such administrator, and other creditors of said Grover, is to set aside two deeds of conveyance. The first dated the 20th of April, 1839, is from John Scott, and Robert Purviance, Jr., trustees, Rebecca B. Carter, and the said Charles Grover, as grantors, and conveys to the defendant, Matthew McColm, the grantee, a farm lying in Baltimore county, containing about 206¼ acres of land. The second, dated the 18th of July, 1839, is from said Charles Grover, and conveys to the same party, for the consideration of $1100 therein expressed to have been paid by the grantee to the grantor, all the stock and farming utensils on said farm.

The bill charges that the first deed, so far as it operated to convey the interest of Grover in said farm, was made without consideration, and with a design to hinder, delay, and defraud his creditors; that the grantee well knew this intent, and combined with the grantor in effectuating it:—That the second deed was fraudulently made, and designed to hinder, delay and defraud the creditors of the said Grover, and that the consideration therein mentioned was colorable merely and was not paid

at the time of its execution—that the grantee received it knowing of such fraudulent intent, and helping to effectuate it.

The bill further charges, that at the time of the execution of these deeds, the said Grover was utterly insolvent, and known so to be by the defendant, *McColm*, and that the property described in said deeds constituted the largest part of his available assets. That ever since the execution of these deeds, said Grover had remained in possession of the property, mentioned in them, and has used and enjoyed the same and taken the rents and profits thereof to his own benefit and still continues so to do. The bill then states that Grover applied for the benefit of the insolvent laws on the 16th of March, 1841—the appointment of Glenn as his trustee—and said Grover's indebtedness to the estate of the said Eaton R. Partridge, and then prays said deeds to be declared fraudulent and void, &c.

The answer of McColm, which was filed on the 31st of August, 1841, admits the execution of the deeds, but denies that they, or either of them, were or was, made without consideration, and with a design to delay, hinder, or defraud the creditors of said Grover, or that they or either of them, was received by this defendant, knowing of such intent or purpose, but, on the contrary, avers that they were both made for *bona fide* considerations, paid by the respondent before their execution, except a small balance upon the real estate, which was paid immediately after. This answer also states that respondent has no knowledge of the debts due by said Grover, at the time of the execution of these deeds, but denies that he was then utterly insolvent and unable to pay his debts. It asserts that Grover has remained in possession of the property since the execution of the deeds, but denies that he has used, enjoyed and taken the rents and profits thereof to his own benefit, but on the contrary, avers that said Grover has remained in possession thereof, as the tenant of the defendant, under articles of agreement, which are exhibited with the answer. It also admits that Grover has petitioned for the benefit of the insolvent laws, which petition is still pending—the appointment of the complainant as his trustee, &c.

The answer then proceeds to state the considerations for the said deeds, in substance as follows: That previous to the execution thereof, Grover being engaged in the lumber business, had considerable dealings with respondent, and on the 1st of July, 1838, there was a balance due respondent of $2220 95. Said Grover then transferred to respondent a certain claim of $3245, upon which respondent has since advanced the further sum of $1500, said Grover guaranteeing the payment thereof. This claim was not collected by respondent, owing to the insolvency of the party against whom it existed. On the 3rd of April, 1839, respondent loaned Grover an additional sum of $120, whereby Grover became indebted to respondent, in the gross sum of $3892 88 principal and interest up to the 15th of April, 1839. That the land conveyed by the deed then executed, was sold by said Scott and Purviance as trustees under a decree of the Court of Chancery, to said Rebecca B. Carter, who, on the 1st of March, 1838, transferred the benefit of said purchase to Grover, by a written agreement. That on the said 15th of April, 1839, respondent agreed to purchase said land from Grover, for $25 per acre, and in pursuance of said contract, paid said Scott and Purviance $1434 78, and gave Grover a discharge for said sum of $3892 88, as above, and received the conveyance of the 20th of April, in which said Rebecca joined as grantor. That this left the small sum of $128 08 due Grover, which was afterwards fully paid and satisfied. That this contract was made, as a *bona fide* and fair purchase, without any reservation of any kind or nature, and without any claim or reversion on the part of Grover to said land and without any view to Grover becoming an insolvent debtor. That after this, respondent, upon the faith of the stock and implements on said farm, which were owned by Grover, made further advances to him, to a sum amounting, on the 18th of July, 1839, to more than $2000. That at that time respondent purchased and received a bill of sale of said stock, &c., for the sum of $1100. That this purchase also was *bona fide* and fairly made without said Grover being or contemplating to become an insolvent debtor.

The answer of Grover which was filed on the 10th of June, 1842, states that he, Grover, purchased the farm of Rebecca Carter, for $25 per acre, making the total purchase money about $4275. That he paid in money about $1500, which sum he borrowed from the defendant, McColm, and by a small house which he conveyed to said Rebecca, $700. Respondent, also, on account of said purchase, built two houses for said Rebecca at a charge of $1800, of which sum, McColm advanced him between $1000 and $1100. That no other satisfaction was made by him on account of said purchase money. That being indebted to McColm for the said advances, and for other moneys to a large amount, respondent, in satisfaction of his indebtedness, agreed with McColm to cause said farm to be conveyed to him, together with the stock and farming utensils thereon, he, McColm, paying the balance due for said purchase, amounting to about $1400, that according to this agreement, the deeds above mentioned were executed without any such fraudulent purpose as charged in the bill. This answer also states that he, Grover, has remained in possession of said farm as the tenant of McColm. That said McColm purchased said property, fairly and *bona fide*, and that defendant has no interest therein, "and no right to claim a reconveyance thereof except so far as said McColm may think proper to reconvey them to defendant, on payment of all that this defendant owed him, on every account, and that may remain unsatisfied; the said McColm having, *after* the said conveyance of the farm and chattels, so *promised* to said defendant, but without any such view to reconveyance, or any terms to that effect, or on that subject, having been a part of the agreement, under which the said conveyance was made to said McColm." He admits his application for the benefit of the insolvent laws, and also that at the time said conveyances were executed, "he was indebted considerably."

It was proved on the part of the complainants, by many witnesses, that Grover had been in possession of the farm and stock and utensils thereon, from the 26th April, 1839, up to the present time, and so now continues. That he had and has ap-

parently the entire management and control thereof. That no other person, to the knowledge of the witnesses has ever exercised any control or acts of ownership over the same. That said Grover had cut and sold wood, &c., from said place.

The complainants also filed with the commissioners the proceedings upon the application of said Grover for the benefit of the insolvent laws, by which it appears, that in the schedule of his property, after stating how he became possessed of said farm, and the conveyance thereof to McColm, said Grover, states as follows: "The conveyance to Mr. McColm was taken by him under the following agreement, between him and myself, to wit: that if within five years I should pay all my debts to him, on all accounts, he would convey the property to me, but that if the amount of all my indebtedness were not so paid, the farm and all the stock and utensils thereon should be sold and the said indebtedness be thereout satisfied." To this evidence McColm excepted, on the ground that it is not admissible as against him.

The only witness examined on the part of the defendant, was Charles F. Mayer, who states that the insolvent papers for said Grover were prepared by witness at his office, when no one was present except witness and Grover, and that witness attended Grover until he obtained his personal discharge. That McColm did not read said papers, and was not informed of their contents at and up to the time of Grover's obtaining his personal discharge.

The complainants excepted to the admissibility or competency as evidence in the cause, of any and all parts of the answers of the defendants, setting up any consideration affirmatively, as having been paid by said McColm to said Grover, or the trustees for the sale of the farm mentioned in the proceedings, for the property alleged to have been fraudulently conveyed to McColm.

The cause was removed to this court upon the suggestion of the defendant, McColm, and after argument by counsel, the following opinion was delivered:]

THE CHANCELLOR:

The object of the bill filed in this cause, is to set aside two conveyances, the one from the defendant Grover and others, to the defendant McColm, dated the 20th of April; and the other dated the 18th of July, 1839, from Grover alone, upon the ground, as to the first deed, that it was made without consideration, and fraudulently to delay, hinder and defraud the creditors of the grantor, Grover, and as to the other, that it was fraudulently made, to delay, hinder, and defraud the creditors of said Grover.

The answer of McColm, with which alone we are to deal, for that of Grover, even if inconsistent with his, could not be read against him, denies the allegations of the bill, and the simple question is, whether the proof offered by the plaintiff, is sufficient, according to the well and long established law of this court, to overcome the answer?

Some discussion was had at the bar, with reference to the character of that part of the answer, which states how, and in what manner, the consideration set forth in the instruments, was paid. It being insisted upon the one hand, and denied on the other, that the answer, in this respect, is responsive to the bill. The bill alleges, that the deed of the real estate, was made without consideration, and fraudulently, to hinder and delay creditors. The answer denies that it was made without consideration, and fraudulently, and then proceeds to state what the consideration was. Now although so much of the answer as states what the consideration was, may not be strictly responsive (a point not intended to be decided) yet the denial of the allegation of the bill, that there was no consideration, is confessedly responsive, and must be overborne by the requisite evidence or must stand for true.

That a consideration was paid for these conveyances, is most clearly established by the evidence; but still it is said, and such appears to be the established law upon the subject, that though made upon a good or valuable consideration, they will not be permitted to avail, if made *mala fide*. A conveyance, even if for a valuable consideration, is not, under the statute of 13th of

Elizabeth, valid in point of law, from that circumstance alone. It must also be *bona fide;* for if it be with intent to defraud or defeat creditors it will be void, though there may be a valuable consideration. This doctrine was laid down in *Twyne's case*, 3 *Co. Rep.*, 81, and as Mr. Justice Story says, has been since steadily adhered to. 1*st Story's Eq. Jurisprudence, section* 369. But though a deed made upon a valuable consideration may be successfully impeached, if shown to be made to defraud, or defeat creditors, it is of course indispensably necessary that the fraudulent intent should be shown. It is not a thing to be presumed, but must be proved, and by evidence sufficient for the purpose.

Now, in this case I am not satisfied of the existence of the fraudulent intent. The statement of Grover upon his application for the benefit of the insolvent laws, being excepted to, is clearly inadmissible as evidence against his co-defendant, McColm, and even if admissible, could not, for the purpose for which it was offered, avail the plaintiff, against the direct and positive evidence of Mr. Mayer, who proves conclusively, that the said defendant could not have had any connection with, or knowledge thereof.

Circumstances here are relied upon, and those circumstances, when ingeniously and skillfully combined, may be made to wear the appearance of suspicion, but I do not find in them, that degree of conclusiveness, which, in my opinion, should induce a court of equity, to take from a purchaser property for which he paid a valuable consideration. The agreement for a reconveyance, upon receiving from the grantor the amount advanced for, and due by him to, the defendant, McColm, is denied, and not proved, and, therefore, it is not necessary to consider what would be the effect of such an agreement if proved, or admitted. I cannot, upon this record, bring myself to think, that McColm, in taking these conveyances, was influenced by a desire to defraud or defeat the creditors of Grover. He had a perfect right, upon common law principles, and apart from our insolvent laws, to secure himself, and with respect to the real estate, there appears in the case, reasons of special weight, entitling

him to that security. The bill, I am of opinion, must be dismissed, but inasmuch as I think it was not brought without some plausible grounds, and perhaps it was the duty of the plaintiff in his character of trustee, to file it, costs will not be allowed.

S. T. WALLIS, J. MASON CAMPBELL, } for Complainant.
JOHN NELSON, CHARLES F. MAYER. } for Defendants.

LEVIN USILTON, vs. JOHN FRANCIS USILTON ET AL. } JULY TERM, 1852.

[CONSTRUCTION OF WILLS—LIMITATION OVER OF PERSONALTY.]

A testator, after bequeathing certain pecuniary legacies to his four daughters, directed that his son *John* was "to hold the farm and have sufficient time to pay off the legacies," and then gave a pecuniary legacy to another son, *Joseph*. HELD—that all these legacies, including that to *Joseph*, are charges upon the real estate devised to *John*, and are to be paid, *pari passu*, out of the proceeds of the sale thereof.

A testator bequeathed to his daughter the sum of two hundred and fifty dollars and two negro slaves, "and in case of her death, without issue, the property to go to her sisters." HELD—that the limitation over is void as to the two hundred and fifty dollars, being after an indefinite failure of issue.

The mere circumstance that the limitation over is to a person *in esse* will not of itself be sufficient, even as regards bequests of personalty, to restrict the words "dying without issue," to mean a dying without issue at the death of the first legatee.

Where the limitation over after a bequest of personalty is if the first legatee dies without "*leaving*" issue, the word "*leaving*" restricts the limitation over to a definite failure of issue.

[*Francis Usilton*, by his will, executed on the 5th of February, 1850, devised and bequeathed as follows: "*Item*—I give and bequeath unto my daughter *Francis Philena Reed*, wife of *Geo. R. Reed*, the sum of five dollars."

"*Item*—I give and bequeath unto my daughter *Susan A. Usilton*, the sum of two hundred and fifty dollars, one negro boy named *Sam*, and one negro girl named *Maria*, and in case

of her death without issue, the property to go to her sisters, *Mary E. Usilton* and *Ann R. Usilton.*

"*Item*, I give and bequeath unto my daughter, *Ann R. Usilton*, the sum of four hundred dollars, and one negro girl named *Hester*, and in case she dies without leaving issue, the property to go to *Mary E. Usilton.*

"*Item*, I give and bequeath unto my daughter, *Mary E. Usilton*, the sum of six hundred dollars and one negro girl named *Ellen*, and in case she dies without leaving issue, the property to go to *Ann R. Usilton.*

"*Item*, I give and bequeath unto my son, *John Francis Usilton*, the sum of one thousand dollars, and one negro man named *Jack*, and one boy named *Cuff*, one negro woman named *Hannah*, and one negro woman named *Sal* or *Sally*, and one silver watch, an old man named *Ned* he is to support and take care of, and is to hold the farm, and have sufficient time to pay off the legacies, and in case he dies without leaving issue, the property to go to *Joseph L. Usilton*, his brothers and sisters to have a home free of charge with him.

"*Item*, I give and bequeath unto my son, *Joseph L. Usilton*, the sum of five hundred dollars, and one negro boy named *Ben*, or *Hezekiah*, one negro girl named *Margaret*, and any other property belonging to me not herein named, and in case of his death without leaving issue, the above property to go to *John Francis Usilton.*"

This will came before the Chancellor for construction in this case, upon a bill filed by *Lewin Usilton*, as guardian and *prochein amy* of *John Francis Usilton*, asking for a sale of the land devised by the will for payment of the legacies that might be charged thereon, &c.]

THE CHANCELLOR:

Upon reading the will of Francis Usilton, I am of opinion that all the pecuniary legacies, including that to Joseph L. Usilton, are charged upon the real estate devised to John Francis Usilton, and are to be paid, *pari passu*, out of the proceeds of the sales.

I am also of opinion that the limitation over of the two hundred and fifty dollar legacy bequeathed to Susan A. Usilton, afterwards Susan A. Taylor, is void, being after an indefinite failure of issue. The courts, it is true, incline, in respect to dispositions of personal property, to support the limitation over, and for that purpose avail themselves of slight circumstances or expressions in the will indicative of the intention of the testator; but it is believed to be settled, that even as regards bequests of personal property, the mere circumstance that the limitation over is to a person *in esse*, will not of itself be sufficient to restrict the words "dying without issue," to mean a dying without issue at the death of the first legatee.

The cases cited and commented on in *Newton* vs. *Griffith*, 1 *H. & G.*, 111, and the views maintained by the Court of Appeals in that case, and in the cases which have followed it, fully sustain this proposition. The case of *Biscoe* vs. *Biscoe*, 6 *G. & J.*, 232, leaves the principle undisturbed, though it was deemed inapplicable there, because the subject of the bequest was a negro man, "*a life in being;*" and the subsequent case of *Hatton* vs. *Weems*, 12 *G. & J.*, 83, shows a strong indisposition to carry the principle of *Biscoe* vs. *Biscoe* beyond the precise circumstances of that case, which, from the nature of the property, the subject of the bequest rendered it absolutely certain that the limitation over would take effect, if at all, during a life in being.

In the will under consideration, all the pecuniary legacies are limited over, and in the reference to each of them except that to Susan A. the bequest over is to take effect if the first legatee dies without "*leaving* issue," which word "*leaving,*" when applied to bequests of personal property, is deemed sufficient to restrict the limitation over to a definite failure of issue. In the bequest to Susan A., the word "*leaving*" is omitted, the words being "in case of her death without issue" the property to go over to her sisters, and this is a circumstance well worth consideration in construing this will. My opinion, then, is, that the limitation over of the bequest to the testator's daughter, Susan A., is void, being too remote, and that it must be given to her surviving husband.

WILLIAM O. EICHELBERGER
vs.
NATHAN HARRISON.

December Term, 1851.

[Act of 1833, ch. 181, relating to mortgages, construction of, etc.]

The Act of 1833, ch. 181, contemplates that the proceedings upon mortgages taken under it should be *ex parte*, until after the decree and sale, and that the propriety of the decree and the validity of the sale may be inquired into and contested after the order of ratification *nisi*, and before the final order.

The mortgagor in such a mortgage cannot, therefore, complain that he had no notice of the application for a decree; neither can he prevent the sale under the decree, upon the ground that he is entitled to credits against the debt secured by the mortgage, which credits existed, if at all, prior to and at the time of its execution.

[The facts of this case are fully stated in the opinion of the Chancellor.]

The Chancellor:

It is quite evident, that the proceeding upon mortgages, like the present, which was taken in conformity with the provision contained in the second section of the Act of December session, 1833, ch. 181, being "an Act relating to mortgages," was contemplated to be *ex parte*, until after the decree and the sale under the decree, and that the propriety of the decree and the validity of the sale made thereunder were to be inquired into and contested after the passage of the order of ratification *nisi*, and before the final order of confirmation should be passed.

The second section expressly provides, that when mortgages are executed in the manner therein specified, the mortgagees may at any time, after filing the same to be recorded, submit the original, or an official copy, to the Chancellor, or Baltimore County Court, or any Judge thereof, who may thereupon *forthwith* decree a sale of the mortgaged premises, and appoint a trustee to make the sale; the sale to be made at any one of the periods limited in the mortgage for the payment of the

mortgage debt. And the only *prerequisite* to the sale is to be found in the third section, which requires the mortgagee before the sale, and after the arrival of the period limited therefor, to file in the Chancery Court, or in Baltimore County Court, a statement of his claim, verified in the mode therein pointed out, that is, by his oath before the Chancellor or Judge, or, according to a supplement to the Act passed at December session, 1839, ch. 9, before any justice of the peace.

The fourth section, however, provides, that the trustee shall make report of his sale to the Chancellor or Baltimore County Court, as the case may be, and that orders may be passed touching the ratification thereof, as is now practiced on sales of mortgaged property in said Courts, and that, as cause against the ratification, allegations may be made and proof exhibited under the orders of the Court, to show that the sale should not have been made, and that, upon being satisfied of the truth of the allegations, the Courts shall reject the sale, and throw the whole expense thereof, including the commissions of the trustee, upon the party who put the proceeding in motion.

The defendant, therefore, in this case, Mr. Harrison, cannot justly complain that he had no notice of the application for a decree, even if his complaint of the want of notice was conceded or proved, which, however, is not the case, his petition in that respect being expressly contradicted by the answer of the complainant, and there being no evidence whatever in support of the averment.

The decree in this case was passed on the 9th of April, 1851, upon a petition and exhibition of a duly authenticated copy of the mortgage, and the trustee, having bonded as required, advertised the property to be sold on the 19th of July, 1851, all the instalments of the debt having then become due, the complainant having previously, on the 12th of July, 1851, filed in the Court a statement of his claim, verified according to the Act of Assembly.

The mortgage debt, as expressed upon the face of the instrument, is $1000, having been executed to secure the pay-

ment of three notes of $333 33, each dated 8th of August, 1850, payable six, eight, and ten months after date, and the mortgage and the notes bear the same date.

On the 15th of July, 1851, the defendant filed his petition in the cause, in which he alleges that the amount secured by the mortgage had been materially reduced by various dealings and pecuniary transactions between the parties, and he exhibited an account, by which it appeared that the balance due from him very little exceeded one-third of the mortgage claim. This account places upon the credit side the three notes secured by the mortgage; and all the charges on the other side, but three of inconsiderable amount, bear date anterior to the mortgage.

Upon the filing of this petition, however, in which it is alleged that a large portion of the sum included in the mortgage, and for which the property was about to be sold, had been paid, or was not due, the petition being sustained by the affidavit of the petitioner, and an offer made to pay the sum really and in fact due, in order to prevent a sale of the mortgaged premises, I deemed it proper to suspend the sale until the other side could be heard from, and passed an order to that effect. The complainant has since answered the petition, and proof has been taken on both sides, and the question argued on one side in writing, and on the other orally.

From the answer and the evidence, I can see no reason to doubt that the sum expressed in the mortgage is *bona fide* due, and I do not, therefore, feel myself at liberty to send the case to the Auditor for an account. The Act of the Legislature, under which the mortgage in question was taken, was passed for the purpose "of facilitating the enforcement of mortgages of real property and estate in the city of Baltimore." It declares, after saying that such is its object, "that in all cases of conveyances, by way of mortgage, of lands, &c., situate in the city of Baltimore, and where in the said conveyances the mortgagor shall declare his assent to the passing of a decree, as hereinafter mentioned, it shall and may be lawful for the mortgagees or their assigns, at any time after the

filing the same to be recorded, to submit to the Chancellor, or to Baltimore County Court, or any Judge thereof, the said conveyances or copies, under seal, and the said Chancellor, or Court, or Judge aforesaid, may thereupon forthwith decree," &c.

Now, in this case the mortgagor did declare his assent to the passage of such a decree, and yet, after having done so, he proposes to arrest the execution of the decree upon the ground chiefly of his being entitled to credits, which, if they exist at all, existed prior to and at the time of its execution. Certainly, if difficulties of this kind may be interposed under such circumstances, the object of the Act of Assembly will be essentially frustrated.

But, apart from this objection to the petition, I repeat what I have already said, that, looking to the answer to it, and the evidence which has been taken, I see no reason to doubt that the whole amount claimed by the mortgage is due, and I shall therefore dismiss the petition, reserving, however, to the petitioner the right to show himself entitled to credits (if he can do so) at a subsequent stage of the proceedings.

HENRY WEBSTER, for Complainant.
CHARLES F. MAYER, for Defendant.

[An appeal was taken in this case, which is still pending.]

THOMAS BOYLE, AND OTHERS,
vs.
JOHN W. PARKER ET AL.

JULY TERM, 1852.

[WILL AND CODICIL, CONSTRUCTION OF, ETC.—DEVISE OF RENTS AND PROFITS—ACT OF 1825, CH. 119.]

A TESTATOR bequeathed his whole estate, with some small exceptions, to his wife for life, with remainder in fee to his two surviving children and the children of a deceased daughter, and by a codicil, executed the same day, after reciting the devise to his wife, declared that he revoked "the same

in part," and then bequeathed the "rents, issues, and profits," of a certain house and lot, immediately after his death, to his two surviving children, "the same to be applied towards their support and education."

HELD—

That the intent of the testator, manifest upon the face of the will (construing the will and codicil as one instrument,) was simply to revoke the bequest to his wife, so far as the house was concerned, and to give the rents and profits of it for her life to his two surviving children, leaving the will after her death to operate upon it as upon the residue of his estate.

The will and codicil are to be construed together as one instrument, and are to be reconciled, as far as possible, but if irreconcilable, the codicil, as the last indication of the testator's mind, must prevail.

The devise of the profits of land does not, *ex vi termini*, pass the land, but only furnishes evidence of the intention of the testator that it shall pass, subject to be rebutted, of course, by the manifestation on the face of the will of a contrary intention.

In this case nothing is said in the codicil about disturbing the limitation over to the children and grandchildren, and the will and codicil are easily reconciled by making the latter apply only to and operate upon that part of the will which relates to the wife.

The devise in this case being not of lands, but of their rents and profits, and the intent of the testator being manifest upon the face of the will that the land should not pass, the Act of 1825, ch. 119, does not apply.

That Act applies to devises of lands or real property in general terms, without words of perpetuity, or limitation, and gives the entire estate and interest of the testator, unless by devise over, or by words of limitation or otherwise, a contrary intention is indicated.

[The only question in this case arises from the construction of the will and codicil of Patrick Ward, deceased, executed on the 25th of March, 1831. The will and codicil are sufficiently set forth, in the opinion of the Chancellor. After the death of the testator's widow, the property devised by the will was sold, for the purpose of distribution, under the proceedings in this case, and the representatives of the two surviving children of the testator claimed the entire proceeds of the sale of the house and lot mentioned in the codicil, to the exclusion of the testator's grandchildren mentioned in the will. This claim was disputed by said grandchildren, and the question was presented to the Chancellor, upon exceptions to the Auditor's report and accounts distributing the proceeds.]

THE CHANCELLOR:

This cause having been submitted by the written agreement

of the solicitors of the parties upon exceptions to the report of the Auditor, the proceedings and the notes of counsel have been read and considered.

The testator, Patrick Ward, by his will, duly executed in March, 1831, devised and bequeathed to his wife, Lilly Ward, his whole estate, real, personal, and mixed, with some inconsiderable exceptions, for life, with remainder absolutely to his children, and the children of a deceased daughter, naming them, to be equally divided into three parts, so that the children of his deceased daughter should receive one equal third part; and by a codicil, executed on the same day, in which, after reciting that by his will he had given and bequeathed his estate of every description to his wife, he says, "But now I do hereby revoke and annul the same, in part, and hereby give and bequeath, from and immediately after my decease, all the rents, issues, and profits of my two-story brick house in Exeter street, in Baltimore, No. 42, to my said two surviving children, Mary Ann and Edwin, the same to be applied towards their support and education;" and the question is, whether the codicil not only revokes the will, so far as the life estate given to the testator's widow is concerned, but whether it does not give to his two surviving children the absolute and entire interest in said house?

The will and the codicil are to be construed together as one instrument, and are to be reconciled as far as possible, though, of course, if irreconcilable, the codicil, as the last indication of the testator's mind, must prevail. *Lee* vs. *Pindle*, 12 *G. & J.*, 288. And regarding the will and codicil as one instrument, an exposition of it is to be made, to attain, if possible, the intention, which is the first and great object of inquiry.

The testator in this case, by his will, had given his wife a life estate, with remainder to his surviving children, and the children of a deceased daughter, and prescribed the proportions in which they should take. In his codicil, he says he revokes this devise to his wife, in part, and he gives the rents, issues, and profits of this property, immediately after his decease, to his two surviving children, the same to be applied

towards their support and maintenance. He does not in terms revoke the devise of the remainder to his children and grandchildren, after the death of his wife. That is left to stand, and if affected by the codicil, it is by implication and construction only.

The codicil was manifestly made for the purpose of revoking, in part, the devise and bequest to the wife, and for no other purpose; and it would be giving, as I think, an effect to it not contemplated by the testator, to make it operate upon the devise over to his children and grandchildren. It is to be observed, that the codicil does not give the property in question to his children, in the terms usually employed in such cases. It does not give them the house No. 42, but "the rents, issues, and profits" of it, and these words are relied upon as sufficient to pass the title. But a devise of the profits of land does not, *ex vi termini*, pass the land, but only furnishes evidence of the intention of the testator that it shall pass; and if upon the face of the will a different intention is manifest, that evidence is rebutted. *Magruder et al.* vs. *Peters et al.*, 4 *G. & J.*, 323. My opinion is, that upon the face of this will, construing the will and codicil as one instrument, a contrary intention is sufficiently manifest to overcome the evidence of an intention to pass the land afforded by the devise of the rents and profits. There is upon the face of the codicil a plainly indicated intention to give the rents and profits only, and for a temporary purpose, that is, to provide the means of supporting and educating his two surviving children, until the devise over to them and his grandchildren, upon the death of his widow, should take effect. The codicil declares it to be the purpose of the testator to revoke and annul the devise and bequest to his wife only, and that only in part. Nothing is said about disturbing the disposition of the will, with respect to the limitation over to the children and grandchildren, after the death of the testator's widow, and the will and codicil can be easily reconciled by making the latter apply only to, and operate upon, that part of the will which relates to the wife. My opinion then is, that the testator having by his will given

his wife his entire estate for life, with the exception of some articles of little value, with remainder in fee to his surviving children, and the children of a deceased daughter, intended, with respect to this house, to revoke the devise to his wife, and give the rents and profits of it for her life to his surviving children, to support and educate them, leaving the will after her death to operate upon it as upon the residue of his estate, and that consequently the proceeds of it must be distributed amongst his surviving children and the children of his deceased daughter, in the proportions specified in his will, and the account B. being stated according to this view, will be confirmed.

I do not think the Act of 1825, ch. 119, can be made to operate upon this will. That Act applies to devises of lands or real property in general terms, without words of perpetuity or limitation, and gives the entire estate and interest of the testator, unless by devise over, or by words of limitation or otherwise, a contrary intention is indicated. The devise in this case is not of lands or real estate, but of their rents and profits, which, as we have seen, do not, *proprio vigore*, pass the land, but only *afford evidence* of the intention of the testator that it shall pass, subject to be rebutted, of course, by the manifestation on the face of the will of a contrary intention; and that contrary intention, as I think, is exhibited on the face of this will with sufficient distinctness to repel the evidence.

Wm. H. Collins, for the Exceptants.
J. H. B. Latrobe, for the Respondents.

EDWARD DUNN ET AL.
vs.
ERWIN J. COOPER ET AL.

December Term, 1851.

[CHANCERY PRACTICE—MULTIFARIOUSNESS.]

It is extremely difficult, if not impracticable, to lay down any general rule upon the subject of multifariousness. The Courts, in deciding such cases, are governed very much, if not exclusively, by considerations of conve-

nience, in particular circumstances, avoiding the attempt to prescribe an inflexible rule.

In deciding upon new cases as they arise, the Courts are not to disregard previous decisions; they should be consulted and followed, as far as may be safe, having due regard to considerations of general convenience, and the advancement of justice, by avoiding, on the one hand, unnecessary litigation, and on the other, needless and oppressive expenses.

If a bill be liable to be dismissed for multifariousness, the rule is, that it must be dismissed absolutely and *in toto*, and not retained to any extent, and made the foundation of partial relief.

A bill was filed by creditors attacking certain alleged fraudulent conveyances, and a receiver appointed; there was afterwards an amended bill, attacking other conveyances of the same grantor, and asking that the receiver might be ordered to sell certain property alleged to be in danger of loss; and, upon due notice served upon defendants, an order passed accordingly, and a large amount of property sold by the receiver. Two of the defendants to the original, and one to the amended bill, then came in, and demurred to the latter bill, on the ground of multifariousness. HELD—

That, under the special circumstances of this case, it would be most inconvenient to allow this demurrer to prevail, and that it should, therefore, be overruled.

[The original bill in this case was filed, on the equity side of Baltimore County Court, on the 25th of April, 1849, by Edward Dunn and others, creditors of one Erwin Cooper; and after stating said Cooper's indebtedness to them, charges that, on the 3d of April, 1849, said Cooper, then being in a hopeless state of insolvency, executed a mortgage to the Baltimore and Susquehanna Railroad Company, of certain leasehold and personal estate, which mortgage is alleged to have been made with knowledge on the part of the mortgagee of the grantor's insolvency at the time of its execution, and to be fraudulent and void as against his then existing creditors. It also charges that said Cooper, on the 6th of April, 1849, executed to one Joseph P. Grant a deed of trust of all his estate, real and personal, which the bill then proceeds to assail as fraudulent as against creditors. The bill also further states, that Cooper applied for the benefit of the insolvent laws on the 18th of April, 1849; that on the 1st of April, 1849, he had a large amount of property liable to decay and deterioration, and the prayer is for a receiver to take charge of the same, for an account and

general relief. The defendants to this bill were the Railroad Company, Grant, Cooper, and his insolvent trustee.

A receiver was accordingly appointed, and on the 18th of June, 1849, after answers by all the defendants, the complainants filed an amended bill, the allegations of which, and the other proceedings in the cause, are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This case is submitted to this Court upon the demurrers of three of the defendants to the amended bill, and the arguments in writing of the solicitors of the parties, in support of, and in opposition to the demurrers, have been read, the authorities referred to and examined, and the proceedings carefully considered.

The ground of the demurrer relied upon is multifariousness, and it is confessedly extremely difficult, if not impracticable, to lay down any general rule upon the subject; the Courts, in deciding cases of this description, being governed very much, if not exclusively, by considerations of convenience, in particular circumstances, avoiding the attempt of prescribing an inflexible rule. *Story's Eq. Pl.*, *Secs.* 530, 539. "The conclusion," says Mr. Justice Story, "to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive inflexible rule as to what, in the sense of a Court of Equity, constitutes multifariousness, which is fatal to the suit or demurrer." "All that can be done in each particular case, as it arises, is to consider whether it comes nearer to the class of decisions where the objection is held to be fatal, or to the other class, where it is held not to be fatal." *Section* 539.

And I am quite satisfied, that an examination of the numerous cases in which this subject has engaged the attention of the Courts, will show, that an effort to extract from them any fixed and immutable principle, as a guide for all subsequent decisions, will be entirely unsuccessful. The Courts, to be sure, in deciding upon new cases, as they present themselves, are not to disregard previous adjudications. They should be

consulted and followed, as far as may be safe, having due regard to considerations of general convenience, and the important object of advancing the administration of justice, by avoiding, on the one hand, the multiplying unnecessary litigation, and on the other, the involving of suitors in needless and oppressive expenses. The difficulty, indeed the impossibility, of laying down any rule or abstract proposition, as to what constitutes multifariousness, which can be made universally applicable, is conceded on all hands. 1 *Daniel's Ch. Pr.*, 384; *Oliver* vs. *Piatt*, 3 *Howard*, 333, 411, 412.

The general object of these bills, original and amended, is to secure the application of the estate of the defendant, Cooper, to the payment of his debts, an object which the bill charges he has endeavored to defeat, by making various fraudulent transfers and conveyances thereof. The defendants are all of them, if the allegations of the bill are true, (and upon the demurrer they must be assumed to be true,) more or less implicated in these charges, though the acts and transfers with which they are respectively connected are separate and distinct. But, regarding the bill as having the object in view which has been mentioned, and seeing that the various acts with which the several defendants are charged are calculated to defeat that object, the case may possibly come within the principle decided in *Brinkerhoff* vs. *Brown*, 6 *John. Ch. Rep.*, 139, 157, which certainly, in some of its features, is not unlike this. Without, however, coming to any positive conclusion upon this subject, or expressing an opinion as to what might have been the fate of these demurrers but for the proceedings upon this amended bill, which have taken place in Baltimore County Court, I think that in the actual posture of the cause, as it is brought before me, it would be altogether wrong to dismiss it, as might be necessary if the demurrers are sustained; the rule being, that if the bill be liable to be dismissed for multifariousness, it should be dismissed absolutely and *in toto*, and not retained to any extent, and made the foundation of partial relief. *Gibbs* vs. *Claggett et al.*, 2 *G. & J.*, 29; *White et al.* vs. *White*, 5 *Gill*, 376.

The amended bill in this case was filed, in Baltimore County Court, on the 18th of June, 1849; and among other things it charges that, besides the deed of trust mentioned in the original bill as having been executed by Cooper to Joseph P. Grant, and which that bill seeks to vacate as fraudulent, the said Cooper had executed to Grant other conveyances, to defraud his creditors, and that a large amount of perishable property was lying exposed, and in danger of loss, unless the same was directed to be sold by the receiver appointed upon the prayer of the original bill. And the amended bill prays that the receiver may be authorized to sell this property, and for general relief, in respect of the new matters spoken of in this bill. Baltimore County Court, on the same day, passed an order that the defendants, Cooper and Grant, show cause against this application, by a day limited, upon notice being served upon them; and notice having been served accordingly, and no cause to the contrary having been shown, the County Court, on the 6th of July, 1849, passed an order, directing the receiver to sell, upon the terms in the order specified; and, as appears by the report of the receiver, filed on the 9th of March, 1850, the sale has actually been made, producing the net sum of $4611 39.

These parties, Cooper and Grant, are parties to the original bill, and parties also to the amended bill, and they are two of the three defendants who have demurred to the amended bill. Now, if this amended bill should be dismissed, either upon their demurrer, or upon the demurrer of Benjamin P. Powers, who was no party to the original bill, it is obvious the utmost confusion and embarrassment will be occasioned. This amended bill has been so far recognised by the Baltimore County Court as to make it the foundation of an order for the sale of a large amount of property, which property has actually been sold and reported to the Court, and although Cooper and Grant, now insisting upon their demurrer, had notice of the application for authority to sell, they wholly omitted to do so, and suffered the order to pass, their demurrer not having been filed until after the absolute order for a sale had passed.

So far, therefore, as Cooper and Grant are concerned, it would seem to be out of the question to sustain the demurrer. Independently of the proceedings which have taken place in the County Court upon the amended bill, it cannot, in my opinion, be regarded as multifarious, so far as Cooper and Grant are concerned; but in view of those proceedings, adopted in part in consequence of their neglect to oppose them at the proper time, it would seem impossible now to say they can, upon demurrer, get rid of the bill. And with regard to the defendant Powers, I am fully persuaded it is better to retain the bill, and suffer the cause to be tried upon its merits, than to dismiss it. If it is dismissed, as we have seen, it must be dismissed absolutely and as against all the parties, no part of it can be retained, or partial relief afforded under it, and hence the embarrassment and confusion which would result from the order of Baltimore County Court passed upon it, and the sale in virtue of that order.

In reference to these cases, the Courts have considered what was convenient, in particular circumstances, rather than in conformity with any absolute rule, and it appears to me that under the special circumstances of this case, it would be most inconvenient, not to say injurious, to allow these demurrers to prevail; and they will, therefore, be overruled.

E. G. KILBOURN, for Complainants.
COLEMAN YELLOTT, and JOHN NELSON, for Defendants.

SARAH H. BOWIC
vs.
PETER A. BOWIC ET AL. } JULY TERM, 1850.

[DIVORCE A MENSA—CRUELTY OF TREATMENT—CONDONATION.]

MERE petulance and rudeness, and sallies of passion, are not sufficient to constitute "cruelty of treatment," within the meaning of the Act of 1841, ch. 262; there must be a series of acts of personal violence, or danger of life, limb, or health, to authorize a divorce *a mensa*.

Where a husband inflicts blows and other personal violence upon his wife, and by such violence and threats places her in fear for her life, and obliges her to fly from him to avoid serious injury, such conduct constitutes "cruelty of treatment;" and the fact that it was the result of intemperance on the part of the husband in no way diminishes the title of the wife to relief.

There is a difference between condonation of the husband, and of the wife. A much less stringent rule applies to the latter than to the former, because the wife may find it difficult to quit the husband's house, or withdraw from his bed, and she must submit to necessity; circumstances which do not apply to the husband.

Yet, after the parties have become reconciled, the Courts are averse to reviving or listening to old grounds of complaint, which had better be forgotten, as well as forgiven.

A separation occurred in 1847, in consequence of the cruel treatment of the husband. The parties afterwards became reconciled, and lived together. The property upon which the parties lived was settled upon the wife and her children, by the will of her father, in such manner that the husband could not deprive the wife entirely of the beneficial enjoyment of it. The parties were married in 1824, and had raised a large family; and there was no proof of cruel treatment since 1847. HELD, that, under these circumstances, it would not be proper to decree a separation.

The marriage relation is not to be dissolved upon slight grounds; and parties will not be released from the duties and responsibilities it imposes, merely because there may be some want of congeniality in their tempers and dispositions. Public policy and morality alike condemn partial dissolutions of the matrimonial union.

[The bill in this case was filed on the 10th of January, 1850, and alleges that the complainant was married to the defendant in 1824, since which time she has discharged the duties and obligations imposed upon her by her marriage-vows faithfully, and to the utmost of her ability. That her husband, the said Peter Bowie, has, within twelve or fifteen years past, under the influence of intemperance, been so cruel in his conduct towards complainant as to render her existence almost intolerable, and during that period has frequently, by threats and blows, and other personal violence, put complainant in fear for her life; that she has sometimes been obliged to fly from him to avoid serious injury, and at others to invoke the protection of her children and servants to shield her from his assaults. That, in September, 1847, she was compelled, by

his cruel and violent conduct, to require surety of him to keep the peace towards her, and, by his recent misconduct and ill-treatment of the same nature, she has been obliged to separate from him. The bill then charges that John L. Trundle, complainant's father, being anxious to provide for her support and that of her children, executed his will in 1836, in which he devised as follows: "I give and devise unto three of my sons, namely, Horatio, Hezekiah W., and David H. Trundle, the farm now in the occupancy of Peter A. Bowic, together with all the personal property belonging to me now in the possession of the said Peter A. Bowic, to them and their heirs in trust, for the use and benefit of my daughter, Sarah H. Bowic, wife of the said Peter A. Bowic, her heirs and assigns for ever; and the aforesaid trustees are hereby authorized to suffer the aforesaid property to remain in the hands of the said Peter A. Bowic as heretofore, for the benefit of himself and family, but in no case to be allowed the privilege to dispose of any part thereof without their consent or approbation; and if my daughter, Sarah H. Bowic, be left a widow, then and in that case she is to have the entire control of all the aforesaid property, without the let or hindrance of any person, whatsoever." The prayer of the bill is for a divorce *a mensa et thoro*, and for a decree directing the said trustees to hold said property for the use of complainant and her children, and prohibiting the said Peter from interfering therewith, or claiming or demanding any part of the proceeds or profits thereof, and that the trustees be enjoined from paying over any part of the same to him. The husband, and Horatio and Hezekiah W. Trundle, the surviving trustees, were made defendants.

The answer of the defendant, Bowic, denies the charges of cruelty of treatment preferred against him by his wife, and recriminates by charging intemperance and vicious conduct to the complainant. He then proceeds to set up in himself an equitable title to the property devised by the will of John L. Trundle, and denies the construction placed upon the will by

the wife. There being no decision upon this title, it is not necessary to state it.

The answer of the trustees admits the allegations of the bill, and submits to such decree in the premises as may be right.

A commission was then issued, and proof taken, fully sustaining the allegations of the bill as to the cruel treatment by the defendant of his wife, prior to the year 1847, at which time, and in consequence of such cruel treatment, they were separated, but afterwards, becoming reconciled, they lived together again. Since that time there is no proof sustaining the charges in the bill. The cause was submitted upon bill, answer, and proofs, and argued by counsel for the respective parties. The Chancellor dismissed the bill, and, accompanying his decree of dismissal, delivered the following opinion:]

THE CHANCELLOR:

This is an application founded on the third section of the Act of 1841, ch. 262, which authorizes the Court to separate the parties from bed and board, for "cruelty of treatment;" and, upon a careful examination of the evidence, I am of opinion that the conduct of the husband prior to the first separation in 1847 would have entitled the complainant to relief to that extent. The remarks which fell from Mr. Chancellor Kent, in reference to the meaning of those terms as employed in the New York statute, show, I think, that the treatment which the complainant received at the hands of her husband, prior to 1847, amounted to that species of cruelty which entitled the wife to the interposition of the Court. He said, in *Barrere* vs. *Barrere*, 4 *Johns. Ch. Rep.*, 189, that "mere petulance and rudeness, and sallies of passion, may not be sufficient;" there must "be a series of acts of personal violence, or danger of life, limb, or health," to justify the Court in separating the parties. The proof relating to the conduct of the husband in this case, prior to 1847, establishes the charge of personal violence in repeated instances; and though it may have been, and probably was, the result of the too fre-

quent use of intoxicating drink, that does not in any way diminish the title of the wife to the aid of this Court.

But it appears that, after the separation in 1847, the parties lived together, and I do not find in the proof that, between their reunion and the second separation in 1849, the defendant's behavior towards his wife was such as to bring it within the terms of the Act of Assembly, as those terms have been construed by the Courts, that is, that he has been guilty of acts of personal violence towards her, or exposed her to danger of life, limb, or health.

There can be no doubt, and for reasons which are obvious, that the forgiveness of the wife of injuries inflicted upon her by her husband is not pressed with the same rigor against her as would the forgiveness of the husband of the misconduct of the wife be pressed against him. The difference between condonation on the part of the husband and the wife, and the reasons for the difference, are stated in *Shelford on Marriage and Divorce*, 454, *et seq.;* and the authorities cited show that a much less stringent rule is applied to the wife than to the husband. But still, after the parties have become reconciled, the Courts are averse to reviving or listening to old grounds of complaint, which it were better should be forgotten, as well as forgiven.

In this view of the case, I am not much inclined to give weight to the evidence which speaks of the conduct of the husband prior to the first separation in 1847, and certainly it seems to me there is no ground to pronounce a sentence of separation between these parties for anything which has occurred since then. There is, moreover, a circumstance in this case worth considering, when the question is, with what degree of indulgence should the complainant's reconciliation with her husband after 1847 be regarded. Condonation, say the books, with respect to a woman, is held not to bear so strictly, "because it is not improper she should for a time show a patient forbearance;" "she may find a difficulty in quitting his house or withdrawing from his bed;" "she must submit to necessity;"—reasons which do not apply to the husband.

She may have no means of support except under his roof; "and under such circumstances it would," says *Shelford*, "be hard to term submission mere hypocrisy." In this case, however, it appears that this stern necessity, controlling the will of the wife, did not exist. The property upon which she and her husband lived was settled upon her by the will of her father; and although the husband may have certain rights in it, the existence and extent of which it is not at this time thought necessary to determine, it is supposed to be quite clear he has no authority to deprive her entirely of the beneficial enjoyment of it. Whatever may be the character of the estate created by the will of the complainant's father, it would seem impossible to doubt, in view of the manifest intention of the testator to provide his daughter and her children a support from its products, that a Court of Equity would interfere for their protection, if necessary, against the wrongful acts of the husband.

Upon a careful consideration, then, of all the circumstances of this case, I cannot bring myself to think it would be proper to decree the separation of these parties. As was said in *Coles* vs. *Coles*, 2 *Maryland Ch. Decisions*, 351, "The marriage-relation is not to be dissolved upon slight grounds; nor will parties be relieved from the duties and responsibilities it imposes, merely because there may be some want of congeniality in their tempers and dispositions." "Public policy and morality alike condemn these partial dissolutions of the matrimonial union."

This is not the ordinary case of a bill for a divorce and alimony. It asks not only for a divorce, but that the husband shall be excluded entirely from all benefit of the property provided by the father for the support of himself and his children. He has no other property, or means of subsistence, as may be fairly inferred from the record; and if the object of this bill be gratified, for aught that appears, he will in his old age be thrown upon the world in a condition of utter destitution. This is a result which the Court would be reluctant to occasion without a strong necessity; and when it is remembered that

these parties have lived together, with short intervals, since the year 1824, and have reared a family of children—and when it is likewise remembered that the property in question has been managed judiciously by him, and there is no charge that the profits resulting from it have not been applied to the support of his wife and children—the reasons which would induce the Court (assuming the power to exist) to take from him the whole benefit of it, and throw him out upon the world, it may be to beg or to starve, must be of controlling force. The habits of the husband have, no doubt, been bad, and his conduct reprehensible in the highest degree; but there certainly is evidence in the cause, drawn from witnesses whose inclinations would naturally have induced them to throw a veil over the painful subject, which establishes to some extent the recriminating charge in the answer, that the fault is not all on one side. I cannot entirely close my eyes against this proof; for, though it may not extenuate the conduct of the husband, it surely furnishes some defence against the complaint of the wife.

I shall, therefore, under all the circumstances of the case, dismiss this bill, but without giving costs to either party.

RICHARD J. BOWIE, for the Complainant.

JOHN BREWER, and CORNELIUS M'LEAN, for Defendants.

JOHN JOHNS
vs.
JAMES REARDON.

OTHO SCOTT
vs.
JAMES REARDON AND WIFE, AND JOHN JOHNS.

} MARCH TERM, 1852.

[REGISTRATION OF DEEDS—CONSTRUCTIVE NOTICE—ACKNOWLEDGMENT OF DEEDS—PRACTICE.]

THE policy of the registry acts has nothing to do with the question of fraud; the operation of these acts may bind the title, but does not affect the con-

science of the party taking the subsequent conveyance, whilst in cases which are not within those acts, the subsequent purchaser is only affected with such actual notice as would amount to fraud.

Subsequent purchasers are not affected by constructive notice of prior registered deeds and conveyances, unless they are such as are required by law to be registered: the doctrine of constructive notice has never been understood to extend to all deeds which may be *de facto* registered, but to such only as are authorized and required by law to be registered, and are duly registered in compliance with law.

Where an acknowledgment of a mortgage was defective in not being acknowledged before two justices of the peace of the county where the land was situated or the grantors resided, such defect cannot be cured by its registration in the county where the land lies, and notwithstanding such registration, it is wholly insufficient to pass title.

The 3d sec. of the Act of 1766, ch. 14, prescribes the form of the certificate to be given by the clerk of the county in which the acknowledgment is made; and when that form is pursued, either in terms or in words of equivalent import, the clerk of the county where the lands lie is authorized to enrol the deed: he cannot look out of the certificate, and decide whether the deed had or had not been acknowledged before persons authorized to take it.

But such enrolment does not give to the deed enrolled the attributes of a valid conveyance: the instrument still, when thus recorded, and the record thereof, both with reference to its efficacy to pass title, and to its influence upon the rights of others who may become interested in the property conveyed, depend upon whether it was executed and acknowledged according to law.

A certified copy of a deed cannot be more available than the original, the execution of the latter being first duly proved.

A mortgage of lands situated in Harford county, where also the grantors resided, was acknowledged before two justices of the peace of the city of Baltimore, whose qualification was duly certified by the clerk of Baltimore county, and the deed was recorded in Harford county. HELD—

That this deed could not affect a subsequent mortgagee with constructive notice.

Whether the registry of this mortgage was constructive notice to the subsequent mortgagee, depends upon the admissibility in evidence of an official copy thereof from the records of Harford county.

Upon a bill to foreclose a mortgage executed by husband and wife, the wife is a necessary party to the proceedings.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

It appears by the proceedings in these cases, which, by an

agreement filed on the 30th of January last, are to be consolidated, that on the 25th of April, 1839, James Reardon and wife, of Harford county, conveyed to John Johns, the complainant in the first of the above-named cases, a tract of land, situate in the same county, by way of mortgage, to secure the payment of two thousand dollars in the manner therein mentioned.

This deed was on the same day acknowledged by the grantors before two justices of the peace for the city of Baltimore, their qualification duly certified by the Clerk of Baltimore County Court, under the seal of his office, on the following day, and was enrolled by the Clerk of Harford County Court among the land records of the last-named county, on the 18th of May of the same year. All these facts appear upon the face of the deed; and it is moreover in proof, that the grantors therein were, prior to and at the date of its execution and acknowledgment, and ever since have been and are now citizens of, and residing in, Harford county.

It further appears, that on the 8th of December, 1841, Reardon and wife executed to Otho Scott, the complainant in the last of the above-named cases, a mortgage of the same lands to secure the payment of five thousand dollars, as expressed in the deed, which mortgage was acknowledged before an associate judge of the sixth judicial district, on the day of its execution, and duly enrolled among the land records of Harford county on the 15th of the same month and year.

Bills have been filed upon these mortgages by the respective mortgagees, that by Johns against James Reardon alone omitting to make a party of his wife; that by Scott against Reardon and wife, and Johns, the prior mortgagee; and the material question raised and discussed in the written arguments of the solicitors of the parties is, which of the two mortgages is entitled to priority of payment, supposing the proceeds of the sale of the premises should be inadequate to pay both.

There can, of course, be no doubt that the mortgage to Johns is radically defective, not having been acknowledged before two justices of the peace of the county in which the

lands lie, or in which the grantors resided, as required by the acts of 1715, ch. 47, and 1766, ch. 14, or in any other of the modes prescribed by law.

It is not disputed that the mortgage to Johns is invalid as a legal conveyance, but it is insisted that, *inter partes*, it is a good equitable lien; and that having been recorded in the county in which the lands lie, Scott, the second mortgagee, is affected with constructive notice, and that his mortgage must be postponed to the prior equitable lien of Johns.

It may be that as between the parties themselves, or, at least, as far as Reardon is concerned, the mortgage to Johns, though void at law as a conveyance, may be good in equity as a contract; and that a court of chancery, in a controversy in which their rights alone are concerned, would give it efficacy as a contract. That may very well be, and yet in this case, in which the rights of a subsequent incumbrancer are involved, a very different determination may be arrived at. There is no pretence here that Scott, the second mortgagee, when he loaned the money, or took the security from Reardon and wife, had notice in fact, or any the slightest reason to suspect the existence of the prior instrument. If, therefore, he is to be affected by it, it is upon the doctrine of constructive notice, founded upon the registration of the first conveyance and the policy of the registry act.

This policy has nothing to do with the question of fraud. The operation of the registry acts may bind the title, but do not affect the conscience of the party taking the subsequent conveyance, whilst in cases which are not within those acts the subsequent purchaser is only affected by such actual notice as would amount to fraud. 1 *Story's Eq.*, *Secs.* 401 & 403; *Dey* vs. *Dunham*, 2 *Johns. Ch. Rep.*, 190, 191.

The doctrine is too firmly established to be doubted that subsequent purchasers are not affected by constructive notice of prior registered deeds and conveyances, unless they are such as are required by law to be registered. It has never been understood to extend to all deeds which may be, *de facto*, registered, but to such only as are authorized and required by

law to be registered, and are duly registered in compliance with law. 1 *Story's Eq.*, *Sec.* 404; *Lessee of Heister* vs. *Fortner*, 2 *Binney*, 40; *Frost* vs. *Beekman*, 1 *Johns. Ch. Rep.*, 288.

In the last-cited case the Chancellor said, "The question does not necessarily arise how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof or acknowledgment, would charge a purchaser with notice of the mortgage"—"the better opinion in the books seems to be, that it would not be notice, and that equity will not interfere in favor of an incumbrancer, when he has not seen that his mortgage was duly registered."

It would seem, therefore, upon authority to be quite clear, that the mere fact that the mortgage to Johns was enrolled in Harford county would not have the effect of binding Scott by constructive notice, unless such enrolment was authorized and required by law; and the question therefore is, was the deed to Johns, notwithstanding the obvious and admitted defect in the acknowledgment, authorized and required by law to be recorded? It is too clear for controversy that the defect in the acknowledgment was not and could not be cured by the registration, and that notwithstanding the registration, the deed was wholly insufficient to pass the title. The case of *Gittings* vs. *Hall*, reported in 1 *H. & J.*, 15, and 2 *H. & J.*, 380, is conclusive upon this point. The deed in that case from Ogle and wife to James Bosley, was, in reference to the acknowledgment, the precise counterpart of the deed in this case; and yet, though enrolled in the county in which the land lay, it was adjudged defective and inadmissible in evidence as a link in the chain of title attempted to be made out in that case, or rather, to prove the statement on which the jury were asked to ground the presumption of another deed, which was essential to the plaintiff's title.

In the case of *Gittings and Hall*, the Court of Appeals, when it was first before them, decided, that though the deed was defective upon its face, because the acknowledgment was made before two justices of the peace for Prince George's county, when the grantors in the deed were described as of

Anne Arundel county, and the land conveyed as lying in Baltimore county, yet said, that the party offering the deed might give evidence, *aliunde*, that the grantors resided in Prince George's, if such was the fact; and accordingly, upon the second trial in the General Court, evidence to that effect was offered. Upon this evidence, the General Court instructed the jury that a temporary residence was sufficient, and stated, hypothetically, various facts which, they said, if found by the jury, would establish such temporary residence; and the verdict being for the plaintiff, the case was again taken up upon appeal.

The Court of Appeals again reversed the judgment of the General Court, thus not only dissenting from the instructions given to the jury upon the second trial, but again declaring the deed from Ogle and wife inadmissible.

Upon turning to the certificate of the Clerk of Prince George's County Court, as to the qualification of the justices of the peace who took the acknowledgment of Mr. and Mrs. Ogle, it will be found that, instead of using the words contained in the 3d section of the Act of 1766, ch. 14, that the justices by whom the acknowledgment was taken, were "duly commissioned and sworn," he says they were "legally authorized and assigned;" and this was made an objection to the deed. The General Court, however, decided that the certificate was good and sufficient in law to warrant the enrolling the deed by the Clerk of Baltimore County Court, and the Court of Appeals said that the said certificate gave an authority to the Clerk of Baltimore County Court to record the deed, being of opinion that the words "legally authorized and assigned" were within the meaning of the Act of Assembly. Upon recurring to the 3d section of the Act of 1766, ch. 14, it will be seen that the certificate of the Clerk of the county, as to the qualification of the magistrates before whom the acknowledgment is made, as therein provided, is declared to be "a sufficient warrant for the Clerk of the county where the lands do lie, to enrol the deed or conveyance and the endorsement thereon;" and all the Court of Appeals can be under-

stood to have decided is, that the certificate being on the deed, and being in its terms within the meaning of the Act of Assembly, it was a sufficient warrant for the Clerk of the county where the lands lay to record it. In other words, that the Clerk of the latter county could not look out of the certificate of the Clerk of the county in which the acknowledgment was made, and decide whether the deed had or had not been acknowledged before persons authorized to take it. His warrant for the enrolment of the deed was the certificate; and if that was in proper form, he was authorized to put it upon record, whatever the effect of the enrolment might be upon the rights of the parties, or of others.

The 3d section of the Act of 1766, ch. 14, prescribes the form of the certificate to be given by the Clerk of the county in which the acknowledgment is made, and that form being pursued either in terms or in words of equivalent import, the Clerk of the county within which the lands lie is authorized to enrol the deed, but it by no means follows that such enrolment will give to the instrument enrolled the attributes of a valid conveyance, for that would be directly repugnant to the second and preceding parts of the 3d section of the Act, which declare that the estates therein mentioned shall not pass or take effect, unless the deed or conveyance by which the same shall be intended to pass or take effect shall be acknowledged as is therein directed; and although, therefore, the Court of Appeals, in the case of *Hall and Gittings*, expressed the opinion that the certificate of the Clerk of Prince George's County Court being within the meaning of the Act of Assembly, gave an authority to the Clerk of Baltimore county to record the deed, still the instrument when recorded, and the record thereof, both with reference to its efficacy to pass the title, and to its influence upon the rights of others who may become interested in the property attempted to be conveyed, depends upon whether it was executed and acknowledged according to law. It is very certain that the registration of the deed from Ogle and wife, in the case cited, did not cure the defect in the acknowledgment, because the Court of Appeals twice reversed

the judgment of the General Court, in consequence of the latter having admitted that deed in evidence.

The original deed appears to have been offered in that case, but that being adjudged to be inadmissible, it follows necessarily that a copy from the record would not have been received, because it is impossible to maintain that a copy would be more available than the original, the execution of the latter being first duly proved.

Though the doctrine in this state undoubtedly is, that the registry of a deed is constructive notice to subsequent purchasers and mortgagees, it is, as has been shown, equally well settled, that such purchasers and mortgagees are not affected with notice, unless the deeds are such as are authorized and required by law to be registered. A deed unduly registered, either from want of a valid acknowledgment or otherwise, is not notice according to the prevailing opinion in this country. 4 *Kent's Com.*, 174.

Assuming that a copy of the deed in this case from the records of Harford county would be inadmissible as evidence, and this is an assumption which will hardly be disputed, and it follows inevitably that it was not executed and acknowledged in the mode prescribed by law to require its registration, because, if such was the case, an official copy from the record would be evidence; the rule being, that such copies are evidence when the instrument is required by law to be recorded, and this I take to be the test by which the question now before the Court is to be decided, that is, whether the registry of the first mortgage to Johns was constructive notice to Scott, the second mortgagee? If the mortgage to Johns was authorized and required by law to be registered, then an official copy from the record would be evidence; but if a copy would not be evidence, it must be because the law did not authorize and require the registration of the original; and as the question of constructive notice to subsequent purchasers and mortgagees depends upon the due and legal registration of the deed, upon which likewise depends the admissibility of a copy as evidence, it follows that if a copy would not be evidence, the

registry cannot affect subsequent purchasers and mortgagees with notice.

I do not think it possible to maintain, successfully, that a copy from the record of the mortgage to Johns would be admissible evidence, and, therefore, I am of opinion that the registry of it is not to be held as affecting Scott with constructive notice; and as there is no pretence or intimation anywhere that he had actual notice, his mortgage having been duly executed, acknowledged, and recorded, is entitled to priority of payment, should the proceeds of the sale of the premises prove insufficient to satisfy both mortgages.

The Chancellor will sign a decree for the foreclosure and sale of the mortgaged premises, first, to pay the mortgage debt of Mr. Scott, and reserving to the complainant, Mr. Johns, the right to come in upon the surplus proceeds of sale, when the difficulty in regard to the omission to make the wife of the mortgagor a party to his bill is removed by amendment or agreement, and reserving also the question of his right under his mortgage to be paid out of that portion of the mortgaged premises which belonged to the wife of the mortgagor, the Court not meaning now to decide that the mortgage, though defectively acknowledged, can, in equity, be supported as a contract against her.

James L. Bartol and Charles H. Pitts, for Johns.
Albert Constable, for Scott.

[An appeal was taken in this case, which is still pending.]

WILLIAM ROBERTSON, Exr. of THOMAS ROBERTSON, Deceased,
vs.
ISAAC PARKS, AND OTHERS.

December Term, 1850.

[CHANCERY PRACTICE—CREDITOR'S BILL—EVIDENCE—SET-OFF.]

The fact that a defendant dies, after answering, leaving minor heirs, who are then made parties to the suit, does not and cannot vary the effect of

the answer, and the complainant may avail himself of it at the hearing, to the same extent as if no such death had occurred.

Where a creditor's bill, besides the averments of the indebtedness of the deceased debtor, and that he left no personal estate, alleges that no letters of administration had been granted thereon, the admission of this allegation in the answer dispenses with the necessity of producing the proof that would be otherwise required.

A debtor being entitled to the remainder in certain real estate, after the determination of a life estate of his mother therein, died during the lifetime of his mother; HELD—that his interest in this land could be sold for the payment of his debts, the personalty proving insufficient.

The Act of 1785, ch. 72, which authorizes the real estate of a deceased debtor to be sold to pay his debts, when the personalty is insufficient, does not require that such debtor should die *seized* of the real estate proposed to be sold; the words of the Act are, if he "shall *leave real estate* which descends," &c.

A creditor's bill, after averring that the deceased debtor was in his lifetime seized of certain real estate, devised to him by his father, subject to a life estate of his mother therein, and that he died before his mother, leaving no personal property, alleged that the complainant is entitled to have his debt paid out of the real estate of the debtor in the hands of his heirs, or to which he may be entitled in remainder, as aforesaid; HELD—that this allegation was sufficient to entitle the complainant to a decree for the sale of such real estate.

The intervention of a freehold estate, between the possession and the remainder, prevents the owner of the latter from being seized, and, in the case of real estate, claimed by descent, would prevent the remainder-man from becoming the stock of inheritance, though not if acquired by purchase.

Where a deed has been traced into the hands of the complainant, the defendant cannot offer parol evidence of its contents, without first giving notice to the complainant to produce it.

A joint claim against the complainant and another cannot be set off against a debt due to the complainant individually.

The rule at law and in equity is the same, that the right of set-off must be reciprocal, and that mutual claims and such as are in the same right, can alone be set-off.

[The bill in this case was filed by Thomas Robertson, on the 11th of August, 1846, for the sale of the real estate of Edward Parks, deceased, for the purpose of paying his debts. The allegations of the bill and answers, with all the facts of the case, are sufficiently stated in the opinion of the Chancellor. The original defendants to the bill were the brothers and sisters of the deceased, all of whom were adults, and some

non-residents. After answer by the resident defendants, and publication of notice against the non-residents, one of the sisters, who, with her husband, had answered the bill, died, leaving minor children. The case was revived, and these minors made parties, and answered by guardian that they could not admit any of the facts stated in the bill. The original complainant having died before the hearing of the cause, the present complainant, his executor, was admitted to prosecute the suit in his stead. At the hearing of the cause, the following opinion was delivered by the Chancellor :]

THE CHANCELLOR:

This case, which originated on the equity side of Somerset County Court, has been argued by the solicitors of the parties, and submitted by agreement for the decision of this Court, upon the pleadings and proofs.

It is a creditor's bill, and it is not disputed that the claims of the suing creditor, and the inadequacy of the personal estate of the deceased debtor to pay his debts, are sufficiently shown by the admissions of the answer of the original defendants, all of whom were adult, and competent to bind themselves by such admissions at the time the answer was filed.

The circumstance, that one of the original defendants died after answering, leaving minor heirs, does not and cannot vary the effect of the answer, of which the complainant may now avail himself to the same extent as if no such death had occurred.

In addition to the averment of this indebtedness of Edward Parks to the complainant, and that said Parks left no personal estate, the bill alleges that no letters of administration have been granted thereon, and this averment also is admitted by the answer, and dispenses, as I think, with the necessity of producing this proof, which would otherwise be required ; and therefore the complainant would be clearly entitled to a decree for the sale of the real estate, unless some of the grounds of objection set up in the answer, and relied upon in the argument, are valid.

The first objection has reference to the frame of the bill, to which an exception has been filed. The exception is, that the

complainant is not entitled to the relief he prays for, because "he does not allege in his bill, or prove by the evidence, that Edward Parks died seized of any lands or real estate in Somerset county, or elsewhere."

This objection rests upon the assumption that a creditor's bill cannot be sustained when the personal estate of the debtor is not sufficient to pay his debts, for the sale of his real estate, unless it appears by the pleadings and proofs that the debtor was actually and in deed seized of the land sought to be sold.

If this objection is a good one, it would follow, as a necessary consequence, that the creditors of a person owning the remainder or reversion expectant upon the determination of a freehold estate, which person dies during the continuance of the particular estate, could have no recourse to the estate held in remainder or reversion, because, under such circumstances, the party entitled in remainder or reversion could not be said to be seized.

The intervention of the estate of freehold, between the possession and remainder, prevents the owner of the latter from being seized, and, in the case of real estate claimed by descent, would prevent the remainder-man from becoming the stock of inheritance: the rule of the common law being, that the ancestor from whom the inheritance was taken by descent, must have had actual seizin or seizin in deed, and that the intervention of an estate of freehold prevents such seizin. 4 *Kent's Com.*, 385, *et seq.*

When, to be sure, the estate is acquired by purchase, the ancestor may transmit it to his heirs without having had actual seizin; but still, if the objection now under consideration is a good one, such estate would not be answerable for the debts of the ancestor, because he could not be said to have died *seized* of the land.

The bill in this case alleges that Edward Parks, the deceased debtor, "was in his lifetime seized of certain real estate, situate in Somerset county, devised to him by his father, William Parks, subject to the life estate therein devised to his mother, Sally Parks," as appears by a copy of the will, which is ex-

hibited with the bill. "That Edward Parks died in the year 1845 intestate, &c., and that Sally Parks, the devisee for life, is still living," and it appears by the evidence that she lived until the year 1848, when she also died.

It is, therefore, quite clear, upon the showing of the bill, that not only Edward Parks did not die seized of the land devised to him by his father, but that he was not actually and in deed seized of it in his lifetime, the intervention of the life estate in the mother preventing it. But, it does not on this account follow, by any means, that it is not liable to be sold for the satisfaction of the claims of his creditors. The Act of Assembly, which authorizes proceedings in chancery to sell the real estate of a deceased debtor, who dies without leaving personal estate sufficient to discharge his or her debts, does not make it necessary that such debtor should have died *seized* of the real estate proposed to be sold. The language of the fifth section of the Act of 1785, ch. 72, is, "that if any person hath died or shall hereafter die without leaving personal estate sufficient to discharge the debts by him or her due, and shall *leave real estate*, which descends," &c.

Not that such debtor shall die seized of real estate, but that he or she shall die leaving real estate, or having title to real estate, which may be sold for the payment of the claims of the creditors, if the personalty be insufficient.

Now the bill in this case, after making the averment before recited, and after averring that the deceased, Edward Parks, left no personal estate from which his debts could be paid, alleges that the complainant is entitled to have his claims paid out of the real estate of the said Edward Parks in the hands of his heirs, or to which he may be entitled in remainder as aforesaid.

This allegation, I think, is quite sufficient to entitle the complainant to a decree for the sale of such real estate. It amounts substantially to an allegation that at the time of the death of Edward Parks, he was the owner of the remainder devised him by his father, after the determination of the life estate of the mother. Not that he was *seized* of such

remainder, for that could not be, the mother being then living, and an allegation that he was seized would have been untrue in point of fact. The complainant then having, in my opinion, made by his bill a case entitling him to the aid of this Court, and all the allegations of the bill being admitted by the defendants who have answered, and to be taken as confessed by the non-resident defendants, against whom an order of publication passed and has been duly published, it remains to be seen whether there is anything in the matters in avoidance set up in the answer which can be successfully relied upon.

These matters are, first, that Edward Parks, in the year 1841, executed a good and valid conveyance of the land in question to his brother, Whittington Parks, for a valuable consideration, and hence it is insisted that Edward has no title to that portion of said land, which descended to him as one of the heirs of his said brother. This deed was not recorded, is not produced, and is stated in the answer to have passed, upon the death of Whittington, into the hands of the complainant, Thomas Robertson, and by the evidence it appears to have been executed and delivered to Whittington Parks, in the year 1839, and not in 1841, as stated in the answer. The defendants, supposing they had laid a sufficient foundation for the purpose, have offered parol evidence to prove the contents of this deed. This evidence is excepted to by the complainant, and, in my judgment, it is quite clear that the exception is well taken, and the evidence must be excluded. The deed, as appears by the answer, passed upon the death of Whittington Parks into the hands of the complainant, Thomas Robertson, and must be presumed to be in the hands of the present complainant, his executor, and, according to the well-established rule upon the subject, evidence of the contents of the deed cannot be offered without giving notice to the complainant to produce it. *Kennedy* vs. *Fowke*, 5 *H. & J.*, 63. No such notice has been given in this case, and, therefore, without stopping to examine into the sufficiency of the evidence, if admissible, to prove the contents of the deed, I deem it enough to say that it is wholly inadmissible.

The other ground of defence taken in the answer does not call in question the right of the complainant to a decree, but seeks to reduce the amount of his claim by proving a set-off of fifty dollars, which the respondents say was due Edward Parks from Thomas Robertson, on account, at the time of the death of Edward. Perhaps it might be difficult to establish this claim upon the proof offered in its support, but as I do not think it could be used as an offset, even if clearly proved, it is not material to discuss the evidence. The claim, if there be one, is a joint claim against Thomas Robertson and Alexander Robertson, the witness, whilst the debts now sought to be recovered are debts due the former individual only, and as the rule at law and in equity is the same, that the right of set-off must be reciprocal, and that mutual claims and such as are in the same right can alone be set-off, it follows that this claim of Edward Parks, if the proof shows the existence of such claim, being against two parties, cannot be set-off against the individual claim of one of those parties, for the want of that mutuality which the rule requires. *Hall* vs. *Creswell*, 12 *G & J.*, 36.

My opinion, then, is, that the complainant is entitled to a decree, which his solicitor may prepare, appointing a trustee to make sale of the property, and containing a notice to the creditors of Edward Parks to file their claims in the chancery office, as is usual in creditors' bills.

J. W. Crisfield, for Complainant.
John H. Done, for the Defendants.

SARAH E. MITCHELL,
vs.
HENRY S. MITCHELL, ADMR.,
D. B. N. OF JAMES D. MITCHELL.

March Term, 1852.

[CHANCERY PRACTICE.—CHARGE OF DEBT OR LEGACY UPON REAL ESTATE.]

Though an administrator, when called upon to account in Chancery, may exhibit with his answer and explain not only the accounts passed in the

Orphans' Court, but the vouchers for the credits therein allowed him, yet he cannot be compelled to do so.

Accounts settled in the Orphans' Court are *prima facie* evidence in suits relating to the matters contained in them, and he who disputes their correctness has the *onus* upon him of proving their falsity.

The vouchers are to be regarded as evidence, and need not be filed as part of the pleadings: to require them to be produced and explained in detail in the answer would render Chancery proceedings intolerably expensive and voluminous.

It is sufficient if they are produced before the Auditor when he is about to state the account, and their production then will upon application be enforced.

Where a bill alleges that an administrator has failed to *charge* himself with the hire of certain negroes, and the profits of leasehold property, and prays for a discovery of the full value, and true accounts which he has or ought to have received on account thereof, an exception to the answer upon the ground that it does not give this information will be sustained.

The accounts passed in the Orphans' Court, with the light which the vouchers when produced will throw upon them, will not give the complainant the information called for by this charge of his bill.

Where a bill calls upon a defendant for the names and number of the negroes in his possession as administrator, an exception to the answer upon the ground that it does not give this information will be sustained.

A testator, by his will, made in 1825, desired his son to release an undivided interest in certain land which the son held in common with his sister, to the latter, "or, in lieu thereof," pay to his sister $5,000, and "with the payment of which, in case of his refusal or omission to release," as aforesaid, he "charged that portion of his estate" devised to his son. The son accepted the devise, and died in 1837 without executing the release, and thereupon his sister became entitled both to the land charged, and that required to be released by the will; there was some evidence also that she enjoyed in the lifetime of her brother the beneficial use of the land to be released. Upon a bill filed by the sister in 1846, to recover this sum of $5,000 from the general personal estate of her brother, it was HELD,—

1. That, under these circumstances, this claim is *strictissimi juris*, and should be made out in a very clear and satisfactory manner.
2. That the terms of the will are too clear and direct to leave any doubt upon the subject of the existence of the charge upon the land devised to the son.
3. That this charge was extinguished by the descent of the title to the land upon the sister, in whose favor the lien was created.
4. That by accepting the devise, the son became personally bound for the payment of the charge, if he refused or omitted to make the relinquishment required of him.
5. That though thus personally bound, the land devised was the primary fund for the payment of the charge, the personal responsibility being only

a collateral security, and the charge upon the land being destroyed by the union of the title and charge in the sister, she cannot have recourse to the personal estate of the brother to recover this charge.

The son became liable only in respect to the land devised to him, and even his personal contract to pay the money would not, in case of his death, shift the primary liability from the real to the personal estate.

Where land, subject to a mortgage or charge, descends to, or is purchased by a party, who dies, leaving the debt unpaid, the land is the primary fund for the payment of the debt, even though the purchaser covenanted to pay it, such covenant being regarded only as additional security.

The primary responsibility of the personal estate in general cases results from the fact that the contract is primarily a personal contract, the personal estate receiving the benefit, and hence the land is bound only in aid of the personalty.

The case of *Stevens* vs. *Gregg*, 10 *G. & J.*, 143, is not in conflict with this case; the controversy in that case was between pecuniary legatees and the devisee of the real estate, and the legacies were not charged upon the land.

The personal estate is the natural and primary fund for the payment of debts and legacies, even where they are charged upon the land devised or descended, and the real estate is only an auxiliary fund after the personalty is exhausted.

[The bill in this case was filed on the 21st of April, 1846, by Sarah E. Mitchell, who claimed to be a creditor of the estate of James D. Mitchell, deceased, by reason of the devise contained in the will of Francis J. Mitchell, quoted in the opinion of the Chancellor, and of the facts charged in the bill, all of which are fully stated in said opinion. The bill asks that the said claim of the complainant be paid out of the personal estate of the said James D. Mitchell. It also charges that the complainant is one of the distributees of said estate, calls upon the defendant to account in this Court for his administration thereof, proceeds to surcharge and falsify his administration accounts filed in the Orphans' Court in various particulars which are specified, and prays that he may be required to file and produce with his answer each and every voucher referred to in his said accounts. It avers that he had omitted to charge himself with the full hires and services of the negroes held and possessed by him as administrator *d. b. n.*, and with the full profits of certain leasehold property in the city of Baltimore, and prays discovery of the full and true

amounts so received by him, and also the number and names of the negroes in his possession as such administrator.

The answer, after denying that the complainant was a creditor of the said estate upon any account, and setting up various defences to her said claim, all of which sufficiently appear from the opinion of the Chancellor, as to such parts of the bill as are intended to impeach his administration accounts settled in the Orphans' Court, says, that the said accounts are in all respects, as he verily believes, just and true, and that he relies upon the same as true in all respects, and that if he shall be required, he will produce before the auditor of this Court all vouchers in his possession, and sustain the several allowances by such proof as may be required.

To this answer, the defendant filed seven exceptions, the character of which sufficiently appears in the following opinion of the Chancellor, delivered at the hearing thereof at July Term, 1847.]

THE CHANCELLOR:

This case comes now before the Court upon the order of the 12th of July last, passed upon the exceptions of the complainant to the defendant's answer; and arguments have been submitted by the solicitors of the parties. These, together with the pleadings and exceptions, have been read and considered.

Though, as in the case of *Owens* vs. *Collinson*, 3 *Gill & Johns.*, 25, an administrator may, when called upon to account to the Court of Chancery, exhibit with his answer, and explain not only the accounts passed in the Orphans' Court, but the vouchers for the credits therein allowed him, I am of opinion that it would be of pernicious tendency to compel him to do so. It might cause the pleadings to run into a degree of prolixity which would be extremely inconvenient. The accounts settled with the Orphans' Court are *prima facie* evidence in suits relating to matters contained in them, and he who disputes their correctness has the *onus* upon him. The vouchers, the Chancellor thinks, are to be regarded as evidence, and need not be filed as part of the pleadings. It must be

sufficient if they are produced before the Auditor when he is about to state the account. But to require them to be produced now, and explained in detail in the answer, would give rise to a practice which, in my opinion, would render Chancery proceedings intolerably expensive and voluminous. The answer offers to exhibit the vouchers before the auditor, and, indeed, without such an offer, their production would upon application be enforced. *Randall* vs. *Hodges*, 3 *Bland*, 477. I am of opinion, therefore, that the 1st, 2d, 3d, 4th, and 5th exceptions to the answer cannot be sustained.

But the 6th and 7th exceptions present a different question. The bill alleges that the defendant has omitted to *charge* himself with the hire, &c., of negroes, held and possessed by him as administrator, and with the full profits and rents of certain leasehold estates, and prays that he may be compelled in his answer to discover the full value and true amounts which he has received or ought to have received on account thereof. The answer does not give this information, and this is the ground of the 6th exception, which, I think, is well taken. The accounts passed in the Orphans' Court, with the light which the vouchers, when produced, will throw upon them, will not put the complainant in possession of the information called for by this charge in his bill.

The 7th exception is founded upon the omission of the defendant to state the number and value of the slaves which came to his possession as administrator *de bonis non*. One of the prayers of the bill, and it is a prayer warranted by an allegation, calls upon the defendant, in express terms, to state the number and names of the negroes in his possession. This has not been done, and this exception, therefore, is, I think, well taken, and will be sustained.

[After further answer and proof, and agreement of facts, all of which appear in the opinion below, the cause was submitted for final hearing, and argued upon notes by the solicitors of the respective parties. The Chancellor then delivered the following opinion at July Term, 1852.]

THE CHANCELLOR:

The late Francis J. Mitchell, who died in the month of March, 1825, by his will, dated on the 18th of that month and year, devised and bequeathed to his eldest son, James D. Mitchell, valuable real and personal estates, and the will, after making other dispositions, which do not appear to be material to the questions involved in this case, contains this clause:

"Whereas, my said son, James D. Mitchell, and my said daughter, Sarah E. Mitchell, are, in right of their late mother, who was the daughter of Dr. James Davidson, deceased, entitled as tenants in common to a portion or share of the real, personal, and mixed estate, of which he died seized or possessed. Now, it is my will and desire that my said son, James D. Mitchell, by deed duly executed and delivered, relinquish and release to the said Sarah E. Micthell his undivided interest in the same estate and property, or in lieu thereof pay to the said Sarah E. Mitchell the sum of five thousand dollars, lawful money, for and with the payment of which said sum of five thousand dollars, in case of his refusal or omission to relinquish and release as aforesaid, I do hereby charge that portion of my estate and property so devised and bequeathed to the said James D. Mitchell for his own use and benefit."

The bill alleges that James D. Mitchell accepted the devise and bequest to him, and that he omitted or refused to execute a release to his sister, the complainant, as required by the will of his father, and that there consequently devolved upon him a personal obligation to pay the five thousand dollars, which it seeks to recover from his personal representative. James D. Mitchell died in August, 1837, and upon a bill which was filed in the equity side of Charles County Court, in 1838, against his executrix, Elizabeth Mitchell, and which was afterwards amended by making his brother, Henry O. Mitchell, and his infant son, parties, it was decided that as the real estate, called "Myrtle Grove," which James D. Mitchell took under the will of his father, Francis J. Mitchell, and which was charged with the payment of the five thousand dollars, had descended to the complainant, the charge had become extinct by the union of

the title and lien in the same person. The case was taken to the Court of Appeals, and will be found reported in 2 *Gill*, 230.

The appellate Court, it would seem, do not express a positive opinion in reference to the existence of the charge in point of law; but the terms of the will of Francis J. Mitchell are too explicit and direct to leave any doubt upon the subject, and it is agreed on all hands that the charge did originally exist, and that it is now extinguished by the descent of the title to the property upon the complainant in whose favor the lien was created.

The principal question presented in this case is, whether the personal obligation upon James D. Mitchell to pay his sister this sum of money, resulting from his acceptance of the devise in his favor in his father's will, and his refusal or neglect to execute the release required of him, (assuming that he did refuse or neglect to do so,) is so far obligatory upon him as to render his personal estate in the hands of his administrator liable, though the property charged with the payment of it has devolved by law upon the party to whom the payment was to be made?

The plaintiff's case, as it appears to me, does not come very strongly recommended to the favorable consideration of the Court. By the events which have occurred, she has become the owner in fee of the property given by the will to James D. Mitchell, and in respect of which this burden was imposed upon him. She has, also, by his death, if not before, become the owner of the Davidson estate, the refusal or omission to relinquish which constitutes the ground of the personal claim against him, and I am strongly inclined to think that there is admissible evidence in the record of the former cause, and which, by agreement, is made evidence here, as if taken under a commission in this cause, that she did enjoy the benefit of that property during his lifetime. At all events, I think it cannot be doubted that her brother always intended, and even attempted, to comply with the directions of his father's will in this regard, and consequently that he never

contemplated taking upon himself the alternative obligation of paying his sister the five thousand dollars. It is a case, then, in which the complainant has now, and has had, since 1837, when her brother died, an absolute title to the property charged with the payment of the money; in which she also had, and has had, since the same period, if not before, the property which her brother was required to surrender to her, and which, if so surrendered, the claim to the money could have had no existence, and of which, though there was no duly executed and delivered deed of relinquishment, there seems to me some evidence, at least, that she enjoyed the beneficial use in his lifetime. Under these circumstances, the claim to recover the five thousand dollars from the general personal estate from her brother is *strictissimi juris*, and should be made out in a very clear and satisfactory manner. I entertain no doubt whatever that by accepting the benefits conferred on him by his father's will, James D. Mitchell became personally bound for the payment of this money, if he refused or omitted to make the relinquishment required of him. If there could be any doubt upon the language of the will, the case of *West* vs. *Biscoe*, 6 *H. & J.*, 460, would remove it. But, although he became personally bound, the question still remains, he being dead, whether his own estate, or the estate devised to him, was primarily liable for the payment. I do not think this case can be distinguished in principle from that of *Mattheson* vs. *Hardwicke*, note to 2d *Peere Williams*, 664, the authority of which has received frequent and high approbation. In that case it will be found that a testator devised his estate to two persons, charged with the payment of debts and legacies. The devisees accepted the devise, and one of them paid all the debts and legacies, except one legacy of £100, for which he gave his note to the legatee, and died; but this note was held to be a mere collateral security, and that the devised estate was the primary fund for the payment of it. There could, of course, have been no doubt in that case that the devisee was, upon his note, personally responsible for the payment of the legacy. If the acceptance of the devise did not make him so, his note to

the legatee unquestionably did, and yet after his death the devised estate was regarded as the primary fund for the payment of it. In reviewing that case and others of the same class, Chancellor Kent says, in *Cumberland* vs. *Codrington*, 3 *Johns. Ch. Rep.*, 229, "the question, in these cases, seems to be not only whether the purchaser has rendered himself liable at law to a suit by the creditors, but which estate is to be deemed the primary fund, and which only the auxiliary. When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But, when a man purchases, or has devised to him land with an incumbrance on it, he becomes a debtor only in respect to the land, and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases, the primary fund." And the principle thus announced is illustrated by a reference to the cases in which it has been decided, that upon a transfer of a mortgaged estate, the party to whom the transfer is made will not render his personal estate liable in the first instance by adding his personal contract to pay the money, which was not originally his personal debt. The rule being, as declared by Lord Eldon in *Waring* vs. *Ward*, 7 *Ves.*, 336, a very clear one, that the primary responsibility of the personal estate, in general cases, results from the fact that the contract primarily is a personal contract, the personal estate receiving the benefit, and being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil that personal contract. The claim that this sum of five thousand dollars should be paid out of the personal estate of James D. Mitchell, in exoneration of the real estate descended to the complainant, can derive no support, as I think, from the case of *Stevens* vs. *Gregg*, 10 *G. & J.*, 143. That was a controversy between pecuniary legatees and the devisee of the real estate, and it was decided, there being no clause in the will which, either by express terms or by plain inference, charged the real estate with the payment of legacies, that the land devised was not liable. The legatee and the devisee, say the

Court, appear to have been equally the objects of the testator's bounty, and it does not appear to have been his intention to encumber his lands in the hands of his devisee with the payment of the legacies.

The question, in the case now under consideration, is a very different one.

Here, James D. Mitchell became indebted to his sister, the complainant, by accepting the devises in his favor in his father's will, and by omitting (if he did omit) to do that which his father said he should do, or pay his sister five thousand dollars, which sum he charged upon the property devised to his son. There was no primary responsibility on the part of the son to pay the money. He became a debtor, no doubt, by accepting the devises to him, and failing or refusing to do what was required of him (if such be the fact), but still he became a debtor only in respect to the property devised to him, and even his personal contract to pay the money will not make his personal estate liable in the first instance, in exoneration of the property in respect to which only he became the debtor. The case of *Mattheson* vs. *Hardwicke*, already referred to, is conclusive of the point, unless its authority can be shaken, which I do not find anywhere even attempted.

There can be no doubt, and the principle is not disputed, that the personal estate is the natural and primary fund for the payment of debts and legacies, even where they are charged upon the real estate descended or devised, and that the real is only an auxiliary fund after the personalty is exhausted. Such is the language of the Court of Appeals in *Stevens* vs. *Gregg*. But the question still recurs, whether, with regard to this debt, there was any original primary responsibility resting upon James D. Mitchell to pay it? whether the personal obligation does not result from the devise to him, and his acceptance of the devise, and whether he did not become liable only in respect to the land devised? If so, as we have seen, even his personal contract to pay the money would not, in the case of his death, shift the primary liability from the real to the personal estate. The assent of Mr. Chancellor Kent to the doc-

trine, that when a man purchases or has devised to him land with an incumbrance on it, he becomes a debtor only with respect to the land, and if he promises to pay it, is a promisor only on account of the land, which continues to be the primary fund, is very strongly expressed in the case of *Cumberland* vs. *Codrington*, as already cited. He says, "the doctrine, in such cases, is as firmly rooted and tenaciously adhered to as that which subjects the personal estate primarily, and as the 'natural fund' to the payment of debts originally contracted by the party, and even though the debt should be contracted by mortgage without either bond or covenant." In a note to the case of *Butler* vs. *Butler*, 5 *Ves.*, 534, many of the cases upon this subject are collected, and the principle established by the case itself is expanded so as to embrace that now under consideration. The doctrine of *Butler and Butler* is that upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser; and the cases cited in the note show that though the purchaser may have rendered himself liable at law to the mortgagee or creditor, that will not be sufficient, in the case of the death of the purchaser, to shift the primary liability from the real to the personal estate.

This question came before the Supreme Court of the United States in the case of *M'Lean* vs. *M'Lellan*, 10 *Peters' S. C. Rep.*, 625, and after an examination of the cases, it was declared to be the well-established rule upon the subject that the burden of the debt was never transferred from the real to the personal estate, except when the contract is personal and the mortgage is given in aid of the personal contract. But that where the land descends upon or is purchased by a party, subject to a mortgage, and the purchaser dies, leaving the debt unpaid, it will be charged upon the land mortgaged as the primary fund, and the principle is not changed, though the purchaser covenants to pay the debt; the covenant, under such circumstances, being regarded as additional security. The views expressed by the Supreme Court, in the case re-

ferred to at pages 643 and 644, unequivocally maintain the doctrine, and it will be found fully sanctioned by Mr. Justice Story in his *Commentaries on Equity Jurisprudence*, vol. 1, sections 574, 575, and 576.

In vol. 2, of the same work, section 1248, where this subject is again discussed, the principle is reasserted that "where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate; and the covenant is only a collateral security, because the debt is not the original debt of the covenantor."

If this be the principle, and the real estate, which has descended to the complainant, be the primary fund for the payment of this claim, the personal responsibility of James D. Mitchell, resulting from his acceptance of the devise to him, being only a collateral security, I cannot see how it is possible to maintain this bill. The primary responsibility of the land is destroyed by the union of the title and the charge in the same person, and this being so, how can the party, in whose favor the charge was created, and who now holds the primary fund, have recourse to the collateral security? It is clear that if the land was held by a third person the owner of the charge would be thrown upon it, if it be the primary fund, or if the personal estate of the security was made to pay it, the personal representative would be entitled to reimbursement out of the land; and it is not seen how the rights of the parties can be different, or the secondary personal responsibility of James D. Mitchell converted into a primary liability by the circumstance that the land and the charge are united in the same person.

For these reasons, and upon this single ground, and without expressing any opinion upon the other questions which have been so fully and learnedly discussed at the bar, I shall dismiss the bill.

Robert J. Brent, for Complainant.
William Schley, for Defendants.

[No appeal was taken in this case.]

ALONZO LILLY
vs.
JOSIAH KROESEN.

SEPTEMBER TERM, 1851.

[PARTNERSHIP.—CONSTRUCTION OF CONTRACT OF DISSOLUTION.]

WHERE a partner seeks to discharge and falsify a settlement of the partnership affairs, upon the ground of error or mistake, the *onus probandi* is on him to show the errors, otherwise the Court will take it as a stated account, and establish it.

Each partner has the right of full and free access at all times to the books of the partnership.

Where two partners adjusted their partnership accounts, upon full, complete, and truthful *data*, ascertained the proportion of the surplus to which each was entitled, and, by their written contract, deliberately prepared and signed, stipulated how, and from what source each should receive the sum due him, such a settlement cannot be discharged or falsified on the ground of error or mistake.

Where a contract of dissolution provided that the liquidating partner "should, from time to time, as assets may be received," pay to the other a certain sum, "to place him upon equal footing with" the former, and then divide the surplus in the proportion of one-third to the former and two-thirds to the latter, and the assets proved insufficient to make up this equality, it was HELD—

That the latter was entitled to recover from the former one-third of such deficiency, the former having received from the partnership before dissolution a certain sum, in regard to which the equality was to be made by payment to the latter of the sum stipulated in the contract of dissolution.

The contract also stipulated "that no interest is to be allowed or paid by or to either party from the date" of the contract. HELD—that this refers to all sums that may be paid to either party from the date of the contract, including that required to make up the *equality* above referred to.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

It appears by the proceedings in this case, that on the 1st of February, 1836, articles of copartnership were signed by certain parties trading under the name and style of Alonzo Lilly & Company, and the defendant, Josiah Kroesen, the new partnership thus formed to be called Josiah Kroesen &

Company. The partnership was to continue for five years, unless dissolved at an earlier period, as specified in the articles; and of the capital of $20,000, Alonzo Lilly & Company were to put in $15,000 and the defendant $5,000, in the sums and at the periods in that respect provided for. The firm commenced the transaction of business accordingly, and the interest of John C. Baldwin, one of the persons composing the firm of Alonzo Lilly & Company, having been purchased by said Lilly, and the said Lilly and Kroesen having purchased the interest of Royal T. Church, another of said parties, the entire interest in the firm of Josiah Kroesen and Company, became vested in the said Kroesen and Lilly.

The partnership of Kroesen & Company, which, when formed, consisted of four parties, was thus reduced to two, and on the 1st of January, 1839, was dissolved by written agreement, dated on that day: the agreement of dissolution, of which the following is a copy, being written on the same paper upon which the articles themselves were written.

"Baltimore, 1st of January, 1839.

"Alonzo Lilly having purchased of John C. Baldwin his entire interest in the firm of Josiah Kroesen & Co., and Alonzo Lilly and Josiah Kroesen having purchased of Royal T. Church, for the sum of $2,080, payable 1st and 4th of September next, his entire interest in said firm, two-thirds of which, say $1,386 67, is charged to A. Lilly, and one-third, or $693 33, to J. Kroesen, and J. Kroesen having taken the stock of goods now on hand, which cost, as per inventory No. 6, $21,880, at the even sum of $20,000, fifteen thousand dollars of which is debited to Alonzo Lilly, and five thousand dollars to Josiah Kroesen on the books of the concern, which amounts are to settle the amounts originally put in by Alonzo Lilly & Company (whose account is now closed by A. Lilly and J. Kroesen), as the capital of the concern: It is hereby agreed, that the firm be this day dissolved, and that Josiah Kroesen shall go on to wind up the business thereof, in the order following: to wit, the amount now standing to the debit ($943 03) and

credit ($16,402 27) of A. Lilly & Co., on leger A, folio 38, are to be transferred to the debit ($943 03) and credit ($16,402 27) of Alonzo Lilly, in folio 19 of leger A, and then, after paying the debts of the concern, shall pay over from time to time, as assets may come in, say $1,402 27 to Alonzo Lilly, and $867 32 to J. Kroesen, (to each in proportion to their respective amounts,) being for the interest on the capital at first put in. This done, he shall from time to time, as assets may be received, pay to A. Lilly $7,705 70, or thereabouts, exclusive of $2,394 31 now at his debit, to place him on an equal footing with Josiah Kroesen, as regards his account of $5050, (leger A, folio 6,) for expenses, &c., and the residue (if any) to be divided from time to time, say two-thirds to Alonzo Lilly, and one-third to Josiah Kroesen, so that in the end Alonzo Lilly shall have received two-thirds and J. Kroesen one-third of the net profits of the business of Josiah Kroesen & Co., from the 1st day of February, 1836, to the 1st day of January, 1839. All sums paid to either party shall, at the time of payment, be charged to their respective accounts, and no interest to be allowed or paid by or to either party from this date."

The plaintiff's bill impeaches this contract and settlement of the partnership of Kroesen & Company in several particulars, and by an amendment made by agreement, and filed on the 24th of this month, it prays for liberty to surcharge and falsify the several accounts referred to and specified in said agreement, in the several particulars in the bill mentioned. And one of the questions, and the most important one in the controversy, is, whether a case has been made out entitling the plaintiff thus to surcharge and falsify?

The right is not placed upon the ground of fraud, which would entitle the party to open and unravel the whole account, and indeed there is no evidence in the cause upon which the least suspicion of fraud can be raised. If the right exists at all, it must be because of error or mistake, which, leaving the settlement to stand, permits the party to surcharge and falsify; the *onus probandi* being on him to whom the liberty is given;

for the Court otherwise takes it as a stated account, and establishes it. But if the party can show an omission for which there ought to be credit, it will be added, (which is a surcharge,) or if a wrong charge is inserted, it will be deducted (which is a falsification.) This, however, must be done by proof on his side. 2 *Daniel's Ch. Pr.*, 764, 765.

The proof in the cause is almost entirely documentary, and I can see nothing in it which leads to the conclusion, either that there was error or mistake, either in the accounts referred to in the agreement of dissolution of 1st of January, 1839, or in that agreement itself. The agreement refers to the leger, and the folio in the leger, in which the accounts of the parties were kept, and there is nothing to show, or from which it can be inferred that the plaintiff, Mr. Lilly, had not full and free access to the books at all times, a right which belongs to him as partner equally with the defendant. *Collyer on Partnership, sec.* 220. Nay, the agreement of dissolution itself shows the amounts which stood to the debit and credit of the respective parties, and the books which have been produced prove the averments so stated to be correct. There is, therefore, manifestly no error or mistake in this respect, and with regard to the sums which were to be paid for interest on the capital put in by the parties, the amount of these sums is also distinctly stated upon the face of the contract of dissolution, and if, therefore, this was a disadvantageous arrangement for the complainant, he cannot ask to be released from it upon the ground of error or mistake.

Neither is there error shown, either in the actual surplus appearing by the inventory, No. 6, which was $20,676 56, nor in the estimated surplus, which the parties assumed would be about $20,000. The first is shown to be correct by the inventory itself, and the estimate appears to have been made by the parties upon the *data* before them. Every facility seems to have been afforded to ascertain the true condition of the concern. An inventory of the merchandise on hand, with the actual cost thereof,—a list of the debts due the partnership, with the names and the amounts due from the several debtors,

—a statement of the amount of the liabilities of the firm, and the condition of the accounts of the partners, were all fairly and openly exhibited before them; and there is no pretence that there was the slightest error or inaccuracy in those elements for forming a correct judgment of the condition of the partnership.

Upon *data* thus full, complete, and truthful, two intelligent merchants meet and adjust their partnership accounts, and ascertain the proportion of the surplus to which each is entitled, and by their written contract, deliberately prepared and signed, they stipulate how and from what source each shall receive the sum ascertained to be due him. It is true that subsequent events may have shown that the estimate of the parties, with reference to the value of a portion of the assets, was too sanguine, but that does not establish error or mistake in the accounts upon which the settlement was based, though it may demonstrate the plaintiff's title to receive something from the defendant for the purpose of producing that equality which the contract of settlement contemplated.

This does not appear to me to be at all like the case of *Williams* vs. *The Savage Manufacturing Company*, decided by this Court upon a former occasion, and affirmed upon appeal to the Court of Appeals. In that case the plaintiff was shown by the proof to have been of very weak mind at the period of settlement, which though based upon accounts, the accounts themselves were neither examined by the plaintiff (who, indeed, was then incapable of comprehending them) nor by any person acting for him. And in addition to this strong ground of objection to the settlement, errors plain, palpable, and seriously injurious to the plaintiff were specifically pointed out, and clearly established by the evidence.

But, though I think the plaintiff has not made out a case authorizing him to surcharge and falsify the accounts upon which the settlement was made, I am of opinion he is entitled to recover from the defendant something upon the footing of the settlement itself. The defendant, as appears by the settlement and books, had received $5,050. The plaintiff had

received, as appears in the same way, $2,394 31, and in order to place him on an equality with the defendant it was necessary he should receive the further sum of $7,705 70. The settlement, after providing for the payment of the debts of the partnership, and the interest on the capital contributed by the partners, contains this language: "This done, he" (the defendant who was made the liquidating partner) "shall from time to time, as assets may be received, pay to Alonzo Lilly $7,705 70, or thereabouts, exclusive of the $2,394 31, now at his debit, to place him on an equal footing with Josiah Kroesen, as regards his account of $5,050, leger A, folio 6, for expenses, &c., and the residue of the surplus (if any) to be divided from time to time, say two-thirds to Alonzo Lilly, and one-third to Josiah Kroesen; so that in the end, Lilly shall have received two-thirds, and Josiah Kroesen one-third of the net profits of the business of Josiah Kroesen & Co., from the 1st day of February, 1836, to the 1st day of January, 1839. All sums paid to either party shall, at the time of payment, be charged to their respective accounts, and no interest to be allowed or paid by or to either party from this date." The state of the accounts between the parties was this: each had received back his capital and the interest upon it, and the debts having been paid, it was supposed the net surplus or profits would be about $16,000, the apparent surplus being a little upwards of $20,000. There stood charged to the defendant upon the books $5,050, and to the plaintiff $2,394 31, so that in order to put the latter upon an equality with the former, relation being had to the interest of each in the concern, it was necessary that he should receive from collections, as they might be made, the further sum of $7,705 70, before the defendant received anything more, and such is the stipulation of the contract. It was manifestly the expectation of the parties that the assets would not only be adequate to accomplish this, but that there would be a still further surplus for division, for the contract further provides for the division of such further surplus.

It has turned out, however, that the collections from the as-

sets have only been sufficient to pay the plaintiff $5,813 68, which falls short of the sum to be paid him, to make the equality proposed by the contract, by $1,892 02, so that in order to place the parties upon a footing of equality, the defendant should pay the plaintiff the sum of $630 67, being one-third of the amount of this deficiency, as the loss resulting from this deficiency should be borne by them in proportion to their interest in the profits, that is, two-thirds by the complainant, and one-third by the defendant.

But it is said the complainant was only to be paid the sum of $7,705 70, in case that amount was realized from the assets, and consequently that the whole risk of their collection was upon him. I cannot think the parties so intended, or that such is the true construction of their contract. Equality, so far as the division of the profits was concerned, clearly appears to have been intended, and no reason can be assigned why the plaintiff should be willing that the defendant should retain the sum of $5,050, standing to his debit, and treated as profits, and that the sum of $7,705 70, which he (the plaintiff) was to receive to place him on a footing of equality, should depend upon the contingency of collections. My opinion, therefore, is that the defendant must bear his share of the loss resulting from the deficiency. He has no right to retain his $5,050, whilst the complainant, instead of receiving as his share of the profits $7,705 70, shall receive no more than $5,813 68. The defendant must, therefore, pay the sum of $630 67 to make that equality contemplated by the contract, and a decree will be passed accordingly.

The only remaining question relates to the claim for interest. The contract says "that no interest is to be allowed or paid by or to either party from this date." It is argued, on the part of the plaintiff, that this stipulation is to be referred exclusively to the sums which may be received and divided between the partners, in case there should be a surplus after paying the plaintiff his $7,705 70. I do not, however, concur in this view. It refers, in my opinion, to all sums which may be paid to either party from the date of the contract. The

stipulation is, that no interest shall be allowed or paid by or to either party from the date of the contract. But the sum of $7,705 70 was to be paid to the complainant after the date of the contract. The money had not then been collected. It was to be paid from time to time as assets should be received, and when the parties agreed that no interest should be allowed or paid by or to either party from the date of the contract, it is very difficult to put a construction upon the terms which shall prevent their applying to such payments. The argument that it is unreasonable and inequitable not to allow the complainant interest on the sums paid by him after the date of the contract, when the defendant was in the actual enjoyment of his proportion of the profits, would be unanswerable, but for the explicit terms in which the parties have couched their agreement. That agreement, however, must control their rights, there being nothing indicating imposition, concealment, or any other circumstance, which can, in any sense or to any extent, impair its validity.

But, although the plaintiff is not, in my judgment, entitled to interest from the date of the contract, I think he should have interest from the period of the filing of his bill, that is, from the 8th of January, 1830, and I shall so decree; each party paying his own costs. Costs are not given, because it appears from a letter of defendant to the plaintiff, dated 27th of July, 1848, that the former proposed to settle with the plaintiff precisely upon the terms now established, which proposal was declined. It may also be observed that that letter shows that the defendant then thought himself liable to the plaintiff to the extent now decreed against him.

William Schley, for Complainants.
Thomas Donaldson, for Defendant.

JOHN ROSER AND WIFE
vs.
ABRAHAM SLADE ET AL.

SEPTEMBER TERM, 1851.

[WILL, CONSTRUCTION OF, ETC.—ACT TO DIRECT DESCENTS.]

A TESTATOR devised lands to his son and his heirs, "provided, nevertheless, that if" his said son "should die without heirs lawfully begotten of his body," then over. HELD—that the son took an estate in fee in the land devised to him, and which, upon his dying intestate and without issue, descended to his surviving brothers and sisters, and the children of such as were deceased, as his heirs-at-law.

A bill for the sale or partition of the real estate of an intestate must conform to the Act regulating descents, in order that the rights of election and preference secured to certain of the heirs may be enjoyed, and a demurrer to a bill for the want of this conformity will be sustained.

Though the demurrer is sustained, yet the bill will not be dismissed, because the defects, in not making the averments required by the statute, may be cured by amendment.

[The bill in this case alleges the death of Abraham Slade, seized of real estate, and leaving a last will and testament, containing the devise quoted in the opinion of the Chancellor. That Josias Slade departed this life without heirs of his body. That Abraham Slade, the testator, had eight children, five of whom were sons, one of whom, John Slade, was the father of the female complainant, and died before the testator, Abraham. The bill then proceeds to give a history of the other sons, some of whom were still living, and some had died, leaving issue, who are named, and charges that the land mentioned in the will was devised to Josias Slade for life; that it does not admit of advantageous partition among those entitled thereto; and that it will be for the advantage and interest of all parties concerned and having interest therein, to sell the same, and divide the proceeds thereof between the parties in the proportions in which they may be entitled. The bill then prays subpœnas against the defendants, who were the surviving brothers, and the children of the deceased brothers of Josias Slade, a decree for the sale of the lands, and the distribution

of the proceeds between the complainants and defendants, and for general relief.

To this bill the defendants demurred, upon the ground that the complainants have not by their bill made such a case as entitles them in a court of equity to relief against the defendants, or to a sale of the real estates mentioned in the bill. And that under the will of Abraham Slade, by which they claim, they are not entitled to any part of said real estate as devisees or heirs-at-law.

Upon the hearing of this demurrer, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

This case is brought before the Court, and submitted by agreement of parties upon demurrer to the bill.

The bill is filed by John and Elizabeth Ann Roser, his wife, the latter being one of the children and heirs-at-law of John Slade, deceased, one of the brothers of Josias Slade, also deceased, but whether testate or intestate does not appear. It is alleged in the bill, that Abraham Slade, the father of John and Josias Slade, being seized of real estate in Baltimore County, died some time in the year 1847, leaving a will duly executed, containing the following clause:

"I will and devise unto my son, Josias Slade, one lot of land called," &c., "also $200 in cash, by his paying unto my daughter, Elizabeth Slade, $100 five years after my decease, the aforesaid land and premises to him the said Josias Slade, his heirs, and assigns for ever, provided, nevertheless, that if the said Josias Slade should die without heirs lawfully begotten, then the aforesaid land and premises to be equally divided between his brothers, their heirs and assigns for ever."

From the frame of the bill, it would appear that the complainants suppose they derive their title to the land in question from Abraham Slade, the testator, as it is alleged that Josias Slade, the devisee, under his will, took no more than a life estate, and that the limitation over to his brothers, upon his dying without issue, is good. This, however, is clearly an

erroneous view of the subject, as there can be no doubt, I think, upon the authority of the case *Newton* vs. *Griffith*, 1 *H. & G.*, 111, that Josias Slade, the devisee, took an estate in fee in the land devised to him, and that upon his dying intestate, if he did so die, it descended to his heirs-at-law, who (he dying without issue) are his brothers and sisters, and the children of such brothers and sisters as are dead. *Porter* vs. *Askew*, 11 *G. & J.*, 347.

The bill alleges that the land so devised by Abraham to Josias Slade will not admit of advantageous partition among those entitled thereto, and that it will be for the interest and advantage of all the parties concerned, and having an interest therein, to sell it, that the proceeds may be divided: thus making a case within the provisions of the twelfth section of the Act of 1785, ch. 72, which authorizes the Court to direct a sale of lands and tenements, in which an infant, idiot, or person *non compos mentis* has a joint interest, or interest in common, with any person or persons, upon its appearing that it will be for the interest and advantage of all the parties to make the sale.

But, as has been shown, Josias Slade, the devisee of Abraham, took an estate in fee in the land under his (Abraham's) will, and upon the death of Josias it descended to his heirs-at-law, who are his brothers and sisters, and the children of such brothers and sisters as are dead, and, consequently, the case is precisely like that of *Chaney and Wife* vs. *Tipton*, 11 *G. & J.*, 253, in which it was held that the proceeding must conform to the Act regulating descents, in order that the rights of election and preference secured to certain of the heirs by the statutes may be enjoyed.

It does not follow, however, that because the bill is defective, in not making the averments required by the statute, and in the omission to ask for a commission, that it is to be dismissed because these defects may be cured by amendment, as was permitted in the case of *Chaney* vs. *Tipton*.

[The Chancellor then passed a decree ruling the demurrer good, but retaining the bill, with leave to the complainants to

make such amendments as may be necessary to bring their case within the provisions of the Act to direct descents, and such other amendments as they may be advised.]

Wm. M. Addison, for Complainants.
Z. Collins Lee, for Defendants.

JONATHAN McVEY AND WIFE,
vs.
WILLIAM BOGGS AND OTHERS.

March Term, 1852.

[WIFE'S EQUITY TO HER PERSONAL ESTATE.]

Where the aid of a Court of Equity is necessary to enable the husband to obtain possession of the wife's personal estate, he must do what is equitable, by making a suitable provision out of it for her maintenance and that of her children.

This principle applies to the assignee, for value, of the husband, to the case of transfers by operation of law, or by the act of the husband, to general assignees for the benefit of creditors.

The amount of the provision to be made to the wife in every case must be governed by its peculiar circumstances, and, according to those circumstances, the Court may give to her the whole or only a part of the property.

In this case, the husband, though living with the wife, was bankrupt; they were destitute, having no property, except the wife's share of the proceeds in this cause, amounting to $919 06, and had a large number of children, most of them very young and helpless, to support. The Chancellor decreed the *whole* sum to be settled upon the wife.

[The real estate of Thomas Taylor, deceased, was sold, under the decree in this case, for the purpose of distribution among his children, his heirs at law, one of whom was Frances McVey, the wife of Jonathan McVey. After the statement of the account by the Auditor, awarding the sum of $919 06, of the proceeds of the sale, to the said Jonathan, in right of his wife; the latter, by a next friend, filed her petition, alleging that she was poor, and has six children, the most of whom are very

young and helpless; that her husband is destitute of property, and has actually applied for the benefit of the insolvent laws; that she has no means of support; and praying that her proportion of the proceeds of sale may be invested for her support, and the support of her children.

The Messrs. Boggs also filed their petition, claiming the said proceeds of sale should be paid over to them as judgment creditors of Jonathan McVey, upon a judgment recovered by them in Harford County Court, in November, 1844, upon which *fi. fas.* had been issued and returned *nulla bona.*

The real estate was sold on the 8th of September, 1849, and the sale finally ratified on the 10th of February, 1851. Jonathan McVey petitioned for the benefit of the insolvent laws on the 16th of May, 1849, and it was admitted that he and his wife have no property, and that they have a large number of children, and that Mrs. McVey is dependent chiefly upon the personal exertion of herself and husband for the support of herself and children, that is, that they have no property except their share of the proceeds of the sale in this case.

Both these petitions were set down for hearing, and being heard, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

The case of *Duvall* vs. *The Farmers' Bank of Maryland*, 4 *G. & J.*, 282, has established the principle, long before recognized and acted upon in England, and in several of the States of this Union, that where the aid of a Court of Equity is necessary to enable the husband to obtain possession of the wife's personal estate, he must do what is equitable by making a suitable provision out of it for her maintenance, and the maintenance of her children. And the principle prevails, though there has been an assignment by the husband for a valuable consideration, and the assignee, standing in the place of the husband, and seeking to withdraw the funds from the Court, will be compelled to make the provision.

This allowance to the wife, though the creature of the Eng-

lish Court of Chancery, and regarded as a part of its practice, is placed by the Court of Appeals upon the higher ground of principle, governing and controlling the Court in its dispensation of equitable jurisprudence, from which it is not at liberty to deviate when the circumstances exist which require its application. And as this equity of the wife is binding even against an assignee for value, it, of course, applies with more controlling force to the case of transfers by operation of law, or by the act of the husband, to general assignees, for the benefit of creditors. The case of *Kinny* vs. *Udall*, 5 *John's Ch. Rep.*, 464, and several other cases decided in New York, all of which are cited with approbation by the Court in *Duvall* vs. *The Bank*, maintain this doctrine, and they likewise maintain, that the amount of the provision to be made for the wife in every case must be governed by its peculiar circumstances, and that according to those circumstances the Court may give to her the *whole* or only a part of the property.

In the case of *Kinny* vs. *Udall*, the authorities are collected and examined, and it is clearly shown that the Court "has a discretion in such cases to give a whole or a part to the wife." The Chancellor, in concluding his review of the cases, asks, emphatically, "Why may not the Court give the wife the whole, in every case, if the justice of it and her condition require it?" The doctrine, he affirms, depends upon the particular practice of the Court, and not on general reasoning, and he concludes that the practice has not been sufficiently fixed and uniform to form a determinate rule, controlling the exercise of the discretion of the Court in the particular case. The question, in every case, being, what is a suitable and adequate provision for the wife under the circumstances?

There is nothing, as I conceive, in the case of *Duvall and The Farmers Bank*, which, justly regarded, will be found to conflict with the rule established in New York, or in England, or to limit or fetter the discretion of the Court upon this subject. The object of the Court of Chancery in establishing this equity is to provide out of the wife's property for her maintenance and the maintenance of her children; and if, to accomplish this purpose,

it is necessary to give her the whole, the Court will give her the whole, regarding that object as paramount to the claims of her husband, or the assignees of her husband, whether voluntary or for value. The case of *Kinny* vs. *Udall* was carried to the Court of Errors of New York, and will be found reported in 3 *Cowen*, 590. It underwent a most elaborate discussion at the bar and from the bench, and after an examination of all the authorities, Chief Justice Savage, who delivered the opinion of a large majority of the Court, said, "That as to the amount of a wife's estate which shall be secured to her, that is a fit subject of reference to the master, and must necessarily be determined by the circumstances of each particular case;"—"the rule is, that an adequate provision be made for the wife and the children, if there be any."—"What shall be considered adequate must depend entirely on circumstances."—"In some cases, the whole has been allowed the wife."—"In one case an annuity of £40 per annum;"—"in another, the interest of £800."—"In other cases, the half has been assigned," &c. And it will be found, upon looking at many of the cases, in which the whole of the property of the wife has been assigned her, for the support of herself and children, it has not been because she has been abandoned by her husband, and left entirely to her own unaided labor for her support. Several of them were cases like that now under consideration, in which the husband, though he had become bankrupt, was living with his wife, and yet the whole of her property was allowed her, in opposition to the claim of the assignees of the husband. In the very last case which I have seen reported in the English Chancery, *In re Cutler's Trust*, 6 *Eng. Law and Equity Rep.* 97, the whole fund was given to the wife, in opposition to the claim of the assignee of the insolvent husband, though there was no statement that the husband had deserted his wife, or did not, by his labor, contribute to her support.

Assuming, then, that the Court, in cases of this description, may exercise a discretion, and, according to the circumstances, give the whole or a part to the wife, it would not be very easy to imagine circumstances in which the claim of the wife to have

all settled upon her could be stronger than those which exist here. Jonathan McVey took the benefit of the insolvent laws in May, 1849, and it is admitted that he and his wife are destitute, having no property, except their share of the proceeds in this case, and have a large number of children to support, being dependent chiefly upon the personal exertion of herself and husband. The children, most of them, are very young and helpless, incapable of aiding, to any extent, the exertions of their parents to support them. The proportion of the proceeds of the property, sold under the decree in this case, assigned, by the report of the auditor, to McVey and wife, amounts to $919 06. The property was the real estate of the wife, and all that devolved upon the trustee of the insolvent husband was his initiate curtesy interest as it stood when he petitioned for the benefit of the insolvent laws, which was before the date of the decree for the sale.

Seeing, then, that the principle now so firmly fixed in our equitable jurisprudence, and which commends itself so strongly to favor, is to provide out of the estate of the wife, when it is under the control of this Court, or when its aid is necessary to enable the husband or his assignees to obtain possession of it, an adequate maintenance for the wife and children, and looking to the circumstances of this case, the destitute condition of the wife, and the number and helpless ages of the children, I am of opinion that the whole amount of her interest in the proceeds of sale in this case should be settled upon her, and shall so decree. I am not, however, disposed to subject the petitioners, the Messrs. Boggs, to the costs.

The counsel for Frances McVey may prepare a decree, directing the fund in question to be invested by a trustee in some safe and productive stock for the maintenance of herself and her children, and subject to such further disposition for that purpose as may hereafter seem necessary and proper.

Otho Scott, for the Wife.

John C. Groome, and A. Randall, for the Husband's Assignees.

ALEXANDER C. BULLETT AND OTHERS,
vs.
SAMUEL WORTHINGTON, AND
WALTER WORTHINGTON.

DECEMBER TERM, 1851.

[FRAUDULENT CONVEYANCES.]

THE fact, that a part of the consideration of a deed from a father to his son was paid in money, though it gives to the deed, in legal contemplation, the character of a bargain and sale, cannot preclude a Court of Equity from looking to the fact, that the difference between the sum paid, and the value of the property conveyed, was, in fact, a gift founded on the consideration of natural love and affection.

A father conveyed to his son land worth upwards of $20,000. The deed professed to be for the monied consideration of $12,000, but only $5,000 was, in fact, paid in money by the son. HELD—that this was a voluntary conveyance to the extent of the excess of the value of the land over $5,000.

The services rendered by the son to the father, whilst he lived with him, and during his minority, cannot be set up as a part of the valuable consideration of the deed.

A father is entitled to the services of his son during the latter's minority, even though he does not live with him, and can maintain an action for such services, unless he has, by some act of his own, divested himself of his control over his son.

Indebtment, at the time of the execution of a voluntary conveyance, from a parent to a child, is *prima facie*, though not conclusive, evidence of a fraudulent purpose with respect to prior creditors.

But this presumption may be repelled by showing that the grantor or donor, at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations, and that the settlement upon the child was a reasonable provision, according to his or her condition in life.

When the indebtedness of the grantor, and the voluntary character of the deed are established, it is incumbent on the party claiming under the deed to show affirmatively, and by evidence that leaves no reasonable doubt upon the subject, that the grantor did not, by the conveyance, strip himself of the means to pay all his creditors, but that there remains to him abundant resources to satisfy them in full.

If there be a reasonable doubt of the adequacy of his means, or if his property be so circumstanced that delays, difficulties, and expense must be encountered before it can be made available to the prior creditors, the conveyance must fall.

If the remaining property of the grantor is encumbered, and litigation or difficulties must be encountered before the creditors can realize their

claims, they are hindered and delayed, and the presumption against the deed, for want of a valuable consideration, will be fatal to it.

Such a deed cannot, however, be impeached, because it may produce inequality among the children of the grantor.

Where there is a parol agreement respecting the purchase of lands, and a bond of conveyance is subsequently executed, this merges and extinguishes all previous agreements resting in parol.

A cross-interrogatory by the plaintiff, after referring to the previous statement of the witness, that he had given a bond of conveyance to the son, asked, "when he gave it, and in whose possession it is at this time?" In reply, the witness says, "he does not know; the bond will speak for itself; that it was and supposes now is, in possession of his son's counsel."

HELD—

That this did not prevent the plaintiff from excepting to parol proof of the date and contents of the bond, and that such exception should be sustained.

In this case, it being proved that, at the date of the conveyance to the son, the father was in embarrassed circumstances, the residue of his real estate being previously incumbered by mortgage, and the conveyance being voluntary, to the extent of near $16,000, the Chancellor decreed that it could not be permitted to stand against prior creditors.

[The facts of this case are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR:

After having listened, with great attention, to a very full and able discussion at the bar of the several questions of law and of fact which arise in this case, I have bestowed upon them the most careful consideration of which I am capable.

The cause is an important one, not only with reference to the amount of property involved in the decision, but the questions to be decided give additional interest to it, and I have, therefore, omitted no examination, and spared no pains to arrive at a correct conclusion, according to the best of my judgment.

The object of the bill is to vacate three deeds, executed by Walter Worthington, the father, to Samuel Worthington, the son, dated respectively on the 28th of March, 1825, and the 16th of June, 1825, and the 8th of September, 1826. The two first of these deeds are for a tract of land called

"*Gerar*," containing about two hundred and eighty acres,—the second of them being executed in consequence of some doubt concerning the validity of the acknowledgment of the first, which professes, upon its face, to have been executed for a moneyed consideration of twelve thousand dollars, paid by the grantee to the grantor.

The deed of the 8th of September, 1826, is a mortgage of negro slaves, and sundry other articles of personal property, to secure to the mortgagee, Samuel Worthington, the payment of the sum of $4,000, with interest from the 2d of June, 1825.

These deeds are all of them impeached by the complainants, creditors of Walter Worthington, and by his permanent trustee in insolvency, as having been made to delay, hinder, and defraud creditors, and as therefore void under the provisions of the statute 13 Elizabeth, ch. 5, and the last of them is also assailed as fraudulent and void under our insolvent system.

Though the deed of the land professes to have been made for a moneyed consideration of $12,000, the defendants do not say that that sum was in fact paid by Samuel Worthington, the ground taken in the answers being that he paid only $5,000, and that the difference between that sum and the value of the property conveyed, was not paid in money; that Samuel Worthington had always lived with his father, and, after he attained sufficient age to be useful, had worked for and served him, and that many years before the date of the deed, the father, actuated by natural love and affection, and by satisfaction with his past services and conduct, undertook and promised to purchase for his son a farm, and convey the same to him; and that in pursuance of this agreement, about the year 1817, the father purchased the land in question, and in the autumn of that year put the son in possession. That the land having cost a large sum of money, and more than the father was willing to give the son, it was stipulated that the latter should pay the father $5,000, and that the father should make the conveyance when that sum should be paid. That the son made to his father several payments, in part, of the

consideration money, and obtained from him an obligation for the conveyance, and that he finally paid the whole amount of $5,000, and, at or about the time specified, obtained the deed as stated in the bill.

The proceedings show that this parcel of land was purchased by Walter Worthington of Thomas L. Emory, as trustee under a chancery decree on the 2d of June, 1817, for the sum of $21,967 71, and that he obtained a conveyance therefor from the trustee on the 19th of May, 1821. It may, I think, therefore, be assumed, that the conveyance from Walter Worthington to his son, Samuel, of this land was a voluntary one, founded on natural love and affection, to the extent of the excess of its value over the sum of $5,000, which the answers allege was paid in money.

The mere fact, that a part of the consideration was paid in money, though it gives to the deed, in legal contemplation, the character of a bargain and sale, cannot be permitted to preclude this Court from looking at the fact disclosed by the answer, that the difference between the sum paid and the value of the property conveyed, was, in fact, a gift founded on the consideration of natural love and affection. If this were not so, then the payment of a comparatively very small sum, say one hundred dollars, would deprive the deed altogether of its voluntary character, and shelter the property from the demands of creditors, though the residue of the consideration was confessedly not valuable.

The answers, it will be observed, state that the son had continued to live with his father after he had attained an age to be useful, and that he had worked for and served him, and a strong effort has been made to prove, upon the authority of the adjudged cases, and in opposition to the complainant's exception, that it is competent to the defendants to support their deed by proof, that these services constituted a part of the consideration upon which it was made, so far, at least, as to repel the presumption of fraud founded upon the proof or admission that the entire moneyed consideration, expressed in the deed, was not paid.

I do not deem it necessary to express any opinion upon this question (which, perhaps, is not free from difficulty), because, under the circumstances of this case, and in view of the terms in which these services, as forming an inducement to the deed, are introduced in the answer, I do not regard them as brought forward for the purpose of showing that they constituted any portion of the valuable consideration upon which the deed was executed. It is clear to me, that the fact of the rendition of these services, by the son to his father, is relied upon in the answer of the son, not for the purpose of establishing any indebtedness from the father to his son in respect thereof, but for the purpose of showing that the natural love and affection of the father for the son, was strengthened and invigorated by the fact, that his son had lived with, and dutifully and faithfully served him. The language of the answer of the son is, that his father "actuated, as he believes, by natural love and affection, and by satisfaction with his past services and conduct, undertook and promised this defendant to purchase for him a farm, and convey the same, and settle him thereon;" "that the said farm having cost a very large sum of money, and more than his co-defendant was willing to give him, he expressly stipulated with this defendant that he should pay him $5,000 for said farm, and engaged, when said sum should be paid, to give him, this defendant, a deed for the same."

My impression, therefore, is clear and decided, that the only valuable consideration set up in support of this deed is the sum of $5,000, and that the property, so far as its value exceeded that sum, was settled by the father upon the son, in consideration of natural love and affection; this natural feeling being enhanced by the fact, that the son continued to live with, and serve his father, after he had attained an age to be useful to him.

But, even if the answer was susceptible of a different construction, and it is to be understood as meaning to set up these services, as constituting a part of the valuable consideration for the deed, and conceding the proof of them to be admissible (a point not meant to be decided), still I am of opinion it will

not avail the defendants, because the services were rendered whilst the son lived with the father, and during his minority. Under such circumstances, and, indeed, even though the son did not live with the father, still, being a minor, the father was entitled to his services, and could maintain an action for them, unless, by some act of his own, he had divested himself of his control over him. *Mercer* vs. *Walmsley*, 5 *H. & J.*, 27.

The deed, therefore, as I conceive, of the land to the son, must be regarded for all over the $5,000, paid in money, as voluntary, being founded on the consideration of natural love and affection; and this presents the question, whether it was made under such circumstances as will protect the property from the claims of creditors?

Though the term "voluntary" is not to be found in the statute, yet the construction put upon it by the highest court of this state is, that an indebtment at the time of a conveyance of that description, is *prima facie*, though not conclusive, evidence of a fraudulent purpose, with respect to the prior creditors, though this presumption may of course be repelled, by showing that the grantor or donor at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations, and that the settlement upon the child, was a reasonable provision according to his or her condition in life. This was the conclusion to which the Court of Appeals came, in the case of *Worthington and Anderson* vs. *Shipley*, 5 *Gill*, 449, after a careful review of the authorities.

A principle of much greater sternness had been announced by Chancellor Kent, in the case of *Reade* vs. *Livingston*, 3 *Johns. Ch. Rep.*, 481, who held that the conclusion to be drawn from the cases, was that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the presumption of fraud. That the presumption of fraud does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party, and he declared

"that no such line of distinction could be set up or traced in any of the cases."

Following the rule thus relaxed by the Court of Appeals, the case of *Atkinson* vs. *Philips*, 1 *Maryland Chancery Decisions*, 507, was decided. But it was also held in that case, and as I conceive, in perfect conformity with the opinion in *Worthington and Anderson* vs. *Shipley*, that when the indebtedness of the grantor, and the voluntary character of the deed is established, it is incumbent on the party claiming under the deed, to show affirmatively that the grantor did not by the conveyance, strip himself of the means to pay all his creditors, but that there remained to him abundant resources to satisfy them in full. The same question came before me, and was considered and decided in the case of *Sewell* vs. *Baxter and Wife*, 2 *Maryland Chancery Decisions*, 447, and the principle again maintained, that when the prior indebtedness of the grantor in the voluntary conveyance is shown, the burden is thrown upon the grantee of establishing the circumstances which shall repel the presumption of fraud, and that the deed will stand condemned as fraudulent, with respect to prior creditors, unless the facts necessary to give it validity, are brought before the Court by the grantee.

That the grantee in a voluntary deed, made by a party indebted at the time, is required to remove the imputation of a fraudulent intent, by himself showing the abundance of the remaining property of the grantor to satisfy the claims of his creditors, I do not understand to be disputed, and an effort has been made in this case to exhibit such proof, though the defendants are not to be considered as admitting the deed to be voluntary.

Before the proof is examined, to ascertain whether the defendants have been successful in this attempt, I consider it proper to say, that the party who sets up a voluntary conveyance in opposition to the claims of pre-existing creditors, is required to show, by evidence which leaves no reasonable doubt upon the subject, that the means of the grantor, independent of the property conveyed, are abundantly ample to

satisfy them all. If there be a reasonable doubt of the adequacy of his means, or if his property be so circumstanced, that delays, difficulties and expense must be encountered before it can be made available to his creditors, then, as I conceive, the voluntary conveyance must fall, because then it has the effect to delay and hinder his creditors. The language of the Court in *Salmon* vs. *Bennett*, 1 *Conn. Rep.*, 542, which case was the principal foundation of the decision of the Court of Appeals in *Worthington and Anderson* vs. *Shipley*, shows that these voluntary deeds must yield to the superior claims of creditors, if they operate either in prejudice of their rights or will occasion embarrassment in the prosecution of them. Speaking of voluntary conveyances which will be supported, the Court say, "A voluntary conveyance made to a child in consideration of natural love and affection, if the grantor is in prosperous circumstances, unembarrassed and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, and leaving ample funds unencumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time."

Now, although it may be quite possible that the validity of a voluntary conveyance will not depend upon the disposition which the grantor may make of his property among those who have natural claims upon him, that is, that it cannot be impeached, because it may produce inequality among his children, and, therefore, so far as his children are concerned, the words "comprehending but a small portion of his estate" are of no significancy, yet those words are very pregnant when we are considering the rights of creditors. The courts in introducing them, as indicating one of the qualifications upon the right of a party, who is in debt, to give away his property, show a marked anxiety to take care that no prejudice shall be done to creditors, and the employment of the other words, "and leaving ample funds unencumbered for the payment of the grantor's debts," in the same connection, and as a further restraint upon the power of the donor to part with his pro-

perty, shows, I think, not only that enough shall remain to satisfy his creditors, but that this residuum shall be readily and conveniently accessible to them, and that they shall not be exposed to the expense, delay and difficulty of removing incumbrances from their way. If the remaining property of the grantor is encumbered, and litigation or difficulties must be encountered before his creditors can realize their claims, they are by the voluntary conveyance hindered and delayed. It cannot be said, under such a state of facts, that the grantor is in prosperous circumstances and unembarrassed, and the presumption against the deed for want of valuable consideration will be fatal to it.

I conclude, therefore, that though this Court may not concern itself with the distribution of the property of the parent among his children, it will not permit the claims of pre-existing creditors to be put in jeopardy by a voluntary conveyance from the parent to his child or children, nor will it suffer a deed of that description to stand, unless it be clearly shown that the grantor had left to him ample means to discharge all his obligations, but that these means are unencumbered and readily and conveniently accessible to his creditors. This, I understand, to be the true doctrine upon the subject, as it now stands, divested of much of the rigor of the earlier cases, and especially of the case of *Reade* vs. *Livingston*, before referred to, and it becomes, therefore, necessary to inquire whether the deeds of the 25th of March, 1825, and the 16th of June, 1825, the latter having been executed, to cure some supposed defect in the former, can receive the sanction of this Court when brought to the test of the principle as now understood.

It has been strenuously and forcibly urged by the counsel for the defendant, Samuel Worthington, that his title to the land conveyed by these deeds does not depend upon the condition of the affairs of Walter Worthington at the date of their execution, but that the question to be decided depends upon his situation in the year 1817, when the grantor purchased the lands from Mr. Emory, and when he gave his son a verbal promise that he would purchase a farm for him and

settle him on it. It is insisted, that having made the purchase from Mr. Emory, and the son having taken possession, and having made improvements upon it, his equitable title dates from that period, and that if the pecuniary condition of the father at that time justified such a settlement upon the son, his subsequent embarrassments cannot be allowed to defeat it. It appears, however, from the evidence of the father, who was examined as a witness for the defendants under an order, that he subsequently gave his son a bond of conveyance for the land, and that as the land was worth more than he thought he could give to each of his children, his said son agreed to pay him five thousand dollars. If, therefore, the previous verbal agreement had reference to this particular parcel of land, (of which, however, there is no evidence,) it is quite clear that it was subsequently modified, and that the actual agreement between the son and the father, is to be found in the bond of conveyance in which all previous agreements, resting in parol, are merged and extinguished. *Parkhurst* vs. *Van Cortlandt*, 1 *Johns. Ch. Rep.*, 273. This bond, which appears from the evidence of Walter Worthington, was, and he presumed, is now, in the possession of the counsel of his son, is not produced, nor is its absence accounted for in any way, but, nevertheless, it is urged that there is sufficient evidence of its date and contents, to authorize this Court to give the defendant the benefit of it, in the determination of the question before it. The witness, in his examination in chief, after stating that he gave his son the bond, some time after the purchase of the property in 1817 from Mr. Emory, said he did not recollect the date, but that the bond would speak for itself. And it is admitted, that so far as the question depends upon the proof, the date and contents of the bond are not properly before the Court as evidence. But it is supposed, and has been insisted, that by the cross-examination, the objection to the admissibility of the parol evidence is removed, and that this Court must decide the cause with reference to it, thus carrying back the inception of the defendant's title to a date anterior to the deed of 1825.

I am not at all prepared to say, that if the plaintiff, upon the cross-examination, had asked the witness to state the date and contents of the bond, and the witness had done so, it would be competent to the plaintiff to except to the admissibility of the evidence. Under such circumstances, I should have been very much inclined to think, that the question would have been governed by the decision of the Court of Appeals in *Boteler and Belt* vs. *Beall*, 7 *G. & J.*, 397, 398, where hearsay evidence, not otherwise admissible, was made so by being brought out on the cross-examination of the party, who interposed the exception at the hearing. But the question put upon the cross-examination in this case, after referring to the previous statement of the witness upon the examination in chief, that he, the witness, had given a bond of conveyance to his son, asks when he gave it, and if the witness knows in whose possession it is at this time. And in reply to this question, he says, "he does not know, the bond will speak for itself. Judge Heath was Samuel Worthington's counsel, and the bond was, and he supposes now is, in his possession." The inquiry, then, as to the date of the bond is not answered. So far from it, the witness says he does not know when he gave it, and refers to the bond itself for the information sought for by the question, and in addition states who had and he supposes still has the custody of it. The case, therefore, differs widely from that of *Boteler and Belt* vs. *Beall*, in which the witness answered the question put to him upon the cross-examination, and having answered it, and the information not proving acceptable to the party who called for it, the Court decided it did not lie in his mouth to object to its admissibility. But in this case, the witness expressly says, he is unable to give the information called for by the interrogatory, and points to the source whence it may be obtained, and this source being within reach of the adverse party, no presumption favorable to him can be drawn for the non-production of the paper.

I am, therefore, of opinion, that the exception of the complainants, to the parol proof of the gift, or promise to give, of 1817, and of the date or contents of the bond of conveyance

is well taken, and that the deeds of the 28th of March and 16th of June, 1825, must stand or fall upon the state of circumstances existing at the date of the first of them, when tried by the principles which I have already stated, are applicable to voluntary conveyances from parent to child. And, it remains, therefore, to be seen, whether, consistently with those principles, Walter Worthington was in a condition in 1825 to give his son, sixteen or seventeen thousand dollars worth of property. I say sixteen or seventeen thousand dollars, because, the property cost $21,967 71; and there is no pretence that Samuel Worthington paid, or was required to pay more than $5000. The difference was a gift for the consideration of natural love and affection.

The record of the application of Walter Worthington, for the benefit of the insolvent laws, on the 7th of January, 1828, is among the proceedings, and has been relied upon by both parties, in the argument before me. That record shows that at the date of his application, he owned but forty acres of land, and his credits amounted to less than $350, and that his debts returned upon the list amounted to $3,067 36. At that time therefore, he was unquestionably insolvent in fact as well as in law. It appears, moreover, that the petitioner was examined upon interrogatories put to him, on behalf of his creditors, and in answer to the question, "what property he possessed three years prior to his application for the benefit of the insolvent law?" he says, "that three years ago, he held and owned two parcels of land containing about four hundred and fifty acres," that he held these lands subject to a mortgage to C. S. W. Dorsey, dated 2d of June 1826; to John Tolly Worthington, dated the 16th of April, 1823; and on the 5th of August, 1825; and to John T. H. Worthington, dated the 6th of June, 1826. That afterwards, on the 8th of September, 1826, he sold the equity of redemption to John T. H. Worthington and conveyed the same to him. That besides the money secured by the mortgages, he received about $6000 from John T. H. Worthington. That he owned no other real property to the best of his knowledge. That he owned personal property

consisting of negroes, &c. Some of the negroes died and some he sold to Georgia. The residue, together with all his other personal property, he conveyed by mortgage to Samuel Worthington, on or about the —— day of June, 1826. That at the time he executed the mortgage, he was largely indebted to Samuel Worthington, and that when he executed the absolute conveyance, he received from him the further sum of $600 in cash. That his real estate was mortgaged for about ten thousand dollars." In addition to the evidence obtained from Walter Worthington, in this way he was examined under the commission issued in this case, and upon the cross-examination he says, "the mortgaged lands were sold to pay the mortgage debts, and did not sell for quite enough to pay them."

An agreement has been filed by which it appears, that one of the claims of the suing creditors, accrued as early as the 5th of May, 1822, and a bond is filed dated the 8th of July, 1822, in which Walter Worthington united with his son Charles as his surety in the penalty of $5000, conditioned for the performance by Charles of his duty as trustee under a decree of Baltimore County Court. The claims of the other suing creditors accrued on the 2d of June, 1825, the 8th of May, 1825, the 2d of June, 1825, and the 2d of February, 1827. Six of these creditors obtained judgments against Walter Worthington at September term, 1826, and March term, 1827. Their claims remain unsatisfied, and the question is whether the deed from Walter Worthington to his son Samuel, so far as it is a voluntary one, shall be allowed to stand and be maintained to their prejudice? That these creditors have in point of fact been delayed and hindered by these deeds is quite apparent; and it is very certain, whatever may have been the estimate made by the grantor, at the time of their execution, of his pecuniary condition, that he was greatly mistaken. And it is also very certain that the residue of his real estate was encumbered before the date of the conveyance from Walter to Samuel Worthington, as he himself states that the mortgage to John Tolly Worthington was executed in April, 1823.

I do not therefore think that the defendants have succeeded

in showing that at the date of the deed in question the grantor had ample and unencumbered means over and above the property conveyed by it to pay his debts. It is most manifest that at or about that time his difficulties clustered about him. That even before then he sold some of his slaves to slave-dealers—a measure not often resorted to but under the pressure of some necessity. And taking all the circumstances into consideration, I think I should be relaxing still more, and to a pernicious extent the rule which guards the rights of creditors against voluntary conveyances, and therefore the deed cannot in my judgment be permitted to stand in this case.

Before, however, a decree is passed vacating the deeds, I shall send the case to the Auditor for the purpose of ascertaining the amount due complainants, distinguishing between such as accrued before and after the deed of the 25th of March, 1825, and directing him also to ascertain the amount paid by Samuel Worthington to Walter Worthington on account of the land as stated in the proceedings. Considering that the bill in this case was filed on the equity side of Baltimore County Court as far back as September, 1831, having been transferred to this Court in September, 1850, it is quite probable that there are no other parties who can come in upon the fund which may be raised by a sale of this land, should a sale be decreed, and hence it would seem proper in the first instance, and before passing a final decree, that the precise amount of the claims for which the property may be liable should be previously ascertained. The question and the only question now decided is that the deeds of March and June, 1825, cannot be permitted to stand as against the prior creditors of the grantor. The question of the responsibility of the property conveyed for the claims of subsequent creditors as well as every other question raised in this cause will be reserved.

I do not think the complainants have succeeded in impeaching the deed of the 8th of September, 1826, either as being obnoxious to the statute of Elizabeth or to the provisions of the insolvent laws. The evidence shows, I think, clearly that the consideration money was paid, and the circumstances relied

upon to show that it is void under the insolvent system, as the laws constituting that system have been construed by the courts are, I think, too light and inconclusive in opposition to the proof the other way. That deed therefore must be allowed to stand.

S. T. WALLIS and R. JOHNSON, jr., for Complainants.
JOHN NELSON and JAMES M. BUCHANAN, for Defendants.

[Both parties appealed from the decree of the Chancellor passed in accordance with the above opinion, which appeals are still pending.]

FRANKLIN BETTS ET AL.
vs.
JOHN W. WIRT ET AL.
} SEPTEMBER TERM, 1851.

[CONVERSION OF REALTY INTO PERSONALTY—DOCTRINE OF RELATION.]

WHERE land is sold under the Act to direct descents, or by a trustee under the Act of 1785, ch. 72, for the purposes of partition, or for the payment of debts where the personal estate proves insufficient, the mutation from realty to personalty is not effected until the sale has been finally ratified, and the purchaser has complied with the terms of it.

The ratification of the sale, and compliance with the terms of it by the purchaser, when done, do not relate back and work a conversion from the day of sale.

The doctrine of relation does not apply to such a case; this doctrine is founded upon a principle of equity, and is never admitted to prevail unless required to advance the purposes of equity.

Patents of lands relate back to the certificate so as to overreach prior grants, only when the holder of the prior certificate has a superior equity.

As between the heirs at law, and the next of kin, the superior equity cannot be with the latter; the policy of the law is to permit the estate to descend in the line of the ancestor from whom it came, and the inclination of the courts should be in favor of the heir.

[The facts of the case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This case is submitted to the Court upon exceptions to the report of the Auditor by which the residue of the proceeds of the sale of the real estate in the proceedings mentioned, was assigned to the heirs at law of Annie Mercer, and not as the acceptants insist it should have been, to her personal representatives, and through them to her next of kin, under our statute of distributions.

The land sold was the property of William D. Mercer, deceased, and upon his death intestate descended to Annie Mercer, his infant child and only heir at law. The personal estate of the father being insufficient to pay his debts, a creditor's bill for the sale of the realty was filed, and a decree was passed for that purpose. Under this decree a sale was made on the 16th of November, 1850, and a conditional order of ratification obtained, but before the final ratification, or the time limited to show cause against the ratification had elapsed, Annie Mercer, the infant heir, died, her death having occurred on the 10th of December, 1850, and the sole question raised by the exceptions is, whether the surplus proceeds of sale after paying the debts of the father should be given to the heir at law, or the personal representatives of his daughter and heir.

Upon the death of William D. Mercer, his land of course, descended to his heir at law, subject, however, to the claims of creditors, and the question therefore is, whether at the period of the death of his daughter and heir, the proceedings in this case had progressed to that point, which, according to the doctrine applicable to the subject, had changed the nature of the property and converted that into personal which had been real estate.

Upon this question very elaborate and well-considered written arguments have been prepared and presented by the counsel of the respective parties, which I have read with attention; and I should have much difficulty in coming to a conclusion upon the subject, but that I am strongly impressed with the conviction that the point upon which the controversy

turns has been in principle, if not in terms, decided by the Court of Appeals in the several cases of *The State* vs. *Krebs*, 6 *H. & J.*, 31; *Leadenham* vs. *Nicholson*, 1 *H. & G.*, 267; and *Hammond* v. *Steir*, 2 *G. & J.*, 81.

These it is said were cases under the Act to direct descents, and the question was at what stage of the proceedings the lands of the wife were changed into money, and thus placed under the control of the husband, or liable to the demands of his creditors. They were not, however, all of them cases under the Act to direct descents; two of them being cases under the 12th section of the Act of 1785, ch. 72, which provides for the sale of lands held by infants, &c., jointly or in common with any other person, when it is made to appear by pleadings and proofs that it will be for the interest and advantage of all the parties that a sale should be made.

It seems to me, however, not to be at all material, by what statute, or for what purpose, the land may be ordered to be sold; and the Court of Appeals say expressly in the case of *Leadenham* vs. *Nicholson*, that the rule established in the prior case of *The State* vs. *Krebs*, where the land had been sold under the Act to direct descents, and the proceeding to affect the money was by attachment in a court of law, was applicable to and should prevail in equity.

The question in all the cases was, whether there had been a mutation of the real into personal estate, and the decision was: "that the mutation may be determined to be complete when the commissioner's sale is ratified by the Court, and the purchaser has complied with the terms of it by paying the money, if the sale is for cash, or by giving bonds to the representatives, if the sale is on a credit." This language, to be sure, was used with reference to a sale by commissioners under the Act to direct descents, but it was adopted by the Court as furnishing the true rule, in the case of *Leadenham* vs. *Nicholson*, where the sale was made by a trustee under the 12th section of the Act of 1785, ch. 72.

I take it therefore to be clear, that whether the sale is made by commissioners under the Act to direct descents, or by a

trustee under the Act of 1785, ch. 72, for the purpose of partition, or under the provision of the 5th section of the last-mentioned Act, where the personal estate is insufficient, that the real estate is not changed into personal until everything has been done to effect the mutation which the Court say is necessary for that purpose.

The question is not what form the thing has assumed when the Court is called upon to dispose of it. The rights of the parties do not depend upon whether it be then in fact money. In the case of *The State* vs. *Krebs*, the Court, speaking of the property of the wife in the hands of the commissioners, say, "It is in fact money, but the point of hesitancy is whether, in legal contemplation, it is to be so considered;" and the Court in that case held the mutation to be complete, and that the money was at the disposal of the husband, and liable for his debts, because everything necessary to consummate the transmutation had been done.

The counsel for the personal representatives of course do not deny that the conversion is not complete until the sale is finally ratified, and the terms complied with by the purchaser, but they insist that when this is done, "the ratification relates back and works a conversion from the day of sale." In other words, they maintain that the doctrine of relation applies to the case and carries with it the consequences for which they contend. It is true as they say that the Maryland cases do not explicitly decide this point, but I am far from thinking they reflect no light upon it. If the Court of Appeals had meant that upon the final ratification of the sale and compliance of the purchaser with the terms, the conversion should relate back to the day of sale so as to change the nature of the property from that period, it seems to me they would have said so. The Court, after much reflection, undertake to determine, and do determine, the acts which shall change the property from real to personal, and they say, *when* those acts are done, the change shall be complete. And it seems to me so reasonable that if they intended that the performance of the acts should work a change

from an earlier period they would have said so; that I cannot bring myself to think they meant any such thing.

On the contrary, when settling for the first time and finally a very important principle, the Court would seem to have expressed themselves with less of precision and clearness than usually distinguishes their language if they did not mean that the mutation is complete, when the acts specified are done, and not until then, and that it could not be carried back to an earlier period by the doctrine of relation.

In truth, in my view of the relative equities of the heirs-at-law, and next of kin of parties who die before the mutation of the estate is complete, I see no foundation upon which the principle of relation can be placed. The doctrine of relation is founded upon a principle of equity, and is never admitted to prevail unless required to advance the purposes of equity. It is most frequently resorted to in cases of patents for land granted by the State, which when equity requires it, are permitted to relate back to the certificate so as to overreach prior grants, but this is never done, except when the holder of the prior certificate has a superior equity. *Peter's lessee* vs. *Mains*, 4 *H. & McH.*, 423. But as between the heirs-at-law and next of kin, the superior equity cannot be with the latter. On the contrary, looking to the general policy of the law and the desire always manifested to permit the estate to descend in the line of the ancestor from whom it came, the inclination of the Court should be in favor of the heirs, as otherwise the benefit of the inheritance would most frequently be enjoyed by those who are alien to the ancestor's blood. This policy is strikingly displayed in the 9th section of the Act of 1816, ch. 154, which provides that upon the death of an infant whose lands are sold under that Act before arriving at lawful age or without issue, the proceeds of the sale or the stock in which the proceeds may be invested, shall be considered as real estate, and as such shall descend to those heirs or representatives who would be entitled to the lands in the same manner as if there had been no sale. Here it is seen that though the mutation is complete, the sale not only having been made and finally rati-

fied, but the proceeds existing in money or stock, yet still such is the desire of the law that the blood of him who acquired the property, or from whom it descended upon the infant, should have the enjoyment of it, that the fruits of the property, though its nature is entirely changed, is under the circumstances stated, given to those to whom it would have descended if its original character of real estate had been preserved.

There could not be a stronger illustration of the policy of the law than this, and though the land in the present case was not sold under the provisions of the Act of 1816, it cannot be improper to refer to it as indicating the general policy of the legislature upon the subject.

I should, therefore, proceed at once to ratify the report of the Auditor, giving the residue to the heirs-at-law, but for a difficulty suggested in the report itself, and that is that it does not clearly appear whether the land was or was not sold subject to the dower right of the defendant, Margaret S. Wirt. When that difficulty is removed, an order will be passed.

Henry C. Mackall and Levin Gale, for Exceptants.
John C. Groome, for the Heirs-at-law.

An appeal was taken from the order of the Chancellor passed in conformity with the above opinion, which is still pending.

DIXON GOUGH, ADM'R OF MARY CRANE,
vs.
ROBERT CRANE AND JOHN A. CRANE, EX'RS OF GEO. CRANE.

} MARCH TERM, 1852.

[CHOSES IN ACTION OF THE WIFE — PART PERFORMANCE OF PAROL ANTENUPTIAL CONTRACT — SPECIFIC PERFORMANCE — JURISDICTION OF EQUITY TO DECREE DELIVERY OF BONDS TO THE REPRESENTATIVE OF THE WIFE.]

WHERE the husband neither reduces the *choses in action* of the wife into possession during coverture, nor during his life in case he survives her, they devolve at his death upon her representatives.

The Act of 1798, ch. 101, sub. ch. 5, sec. 8, changes in this respect the English statute of distributions, which gives to the representatives of the husband who survives his wife, *choses in action* not reduced to possession, to the exclusion of the representatives of the wife.

If the husband reduces the *choses in action* of his wife into possession during his lifetime, or recovers judgment upon them at law or in equity, either in his own favor or in favor of himself and his wife, and he survives her, and subsequently dies, they devolve upon his representatives.

Where the marriage itself is the only act of performance of a parol antenuptial agreement, that the *choses in action* of the wife should, in consideration of the marriage, become the property of the husband, if the agreement remains unexecuted, a Court of Equity has no power to decree its specific performance in opposition to the statute of frauds.

Marriage itself, standing alone, is no part performance within the statute of frauds.

A parol agreement made in consideration of marriage is founded on a valuable consideration, and upon consummation of the marriage and delivery of the property in pursuance of the agreement, the case is taken out of the operation of the statute, and will be enforced in equity.

The circumstances of this case are distinguishable from those of the case of *Dugan et al.* vs. *Gittings et al.*, 3 *Gill*, 138, in essential particulars; there being here no legal testimony of mutual promises to marry, and none to bind the husband to the terms of the agreement as stated by the wife, and no clear evidence that the property was delivered in pursuance of the agreement.

Declarations of the lady made in the absence of the intended husband are not admissible to prove the agreement to marry.

Declarations of the lady made in the absence and out of the hearing of the intended husband, to the effect that they had made an agreement, that the husband was to "have all her bonds" and "to allow her the interest on them during her life," are not admissible to bind the husband.

To take a case out of the statute of frauds on the ground of part performance, the plaintiff must make out by clear and satisfactory proof the existence of the contract as charged in the bill, and the act of part performance must be of the identical contract set up by him.

The disinclination of Courts to make further inroads upon the statute, by excepting cases from its operation, is apparent in all the recent cases, and a firm determination exists to make no further relaxation of it.

Where a party is defending himself against the specific execution of a written contract, grounds of defence will be open to him which would not avail him if he as plaintiff were asking the aid of the Court.

Chancery, when called upon to coerce the specific performance of contracts, acts with less restraint than when exercising its ordinary jurisdiction, and will not interfere unless satisfied that the application is fair, just, and reasonable in all respects.

Where the representatives of the wife are asking a Court of Equity to direct the representatives of the husband, to deliver over to them the *choses in action* of the wife not reduced into possession by the husband in his lifetime, and the defence taken is part performance of a parol ante-nuptial agreement, the defendants should be held to the same clear, definite, and unequivocal proof of the contract set up in the answer, as if they were plaintiffs asking for its specific performance.

In this state a Court of Equity will receive parol proof to reform a written contract, so as to make it correspond with the real intention of the parties and then decree its specific execution.

But where the contract is by parol no matter if the intention of the parties was ever so clearly expressed, it would still be void for want of writing, and no reformation of it by a Court of Equity can make it otherwise.

The fact that an objection to the jurisdiction of the Court is not made until the hearing of the cause and after the argument was commenced, though not of itself a sufficient reason for refusing altogether to listen to it, yet in a case where there is doubt upon the question of jurisdiction, is a reason why the Court should lean against the objection.

In this case the Chancellor decreed the delivery up of the *choses in action* of the wife, not reduced into possession by the husband in his lifetime, to the representative of the wife, he being of opinion that it was not clear that there was plain, adequate, and complete remedy at law, and the objection to the jurisdiction not having been made until the hearing.

An action of trover would have given the plaintiff damages only from the demand and refusal, and this would be but a personal demand against the defendants, the executors of the husband, a security which may be much inferior to a decree directing the specific delivery of the bonds.

An action of replevin would require the representative of the wife to give bond with surety for a large sum, and the defendants, by a *retorno habendo* bond, would be able to regain the possession, and the plaintiff's claim to the specific thing thus converted to a personal demand on such bond.

Though the Act of 1841, ch. 163, does not apply to the Court of Chancery, or require objections to the jurisdiction to be made at any particular stage of the case, yet its policy and the manifest justice of the provision, may have influence when a question not free from difficulty is presented.

[The bill in this case was filed on the 19th of December, 1849, by the administrator of Mary Crane, against the executors of her late husband, George Crane. It alleges that the said Mary, then Mary Gough, intermarried with the said George some four years since; that at the time of her intermarriage she held, in her own right, certain bonds for moneys due to her by sundry persons; that after her intermarriage she died, leaving her husband, the said George, surviving her, who has since died, leaving the defendants his executors. That neither before the marriage were the said bonds assigned to the said George Crane, nor during the marriage were said bonds ever assigned or their character changed, nor were they reduced into possession during the life of said George, or judgments obtained upon them; but remained after his death unchanged, executed in the name of the said Mary Gough, unendorsed, unassigned, and in the same condition in which they were at the period of the marriage. That after the death of the said George, his executors took possession of said bonds, and returned and filed the originals thereof in the Orphans' Court of St. Mary's County, and copies of them are made exhibits. That letters of administration on the estate of Mary Crane were granted to complainant on the 13th of December, 1849. That as such administrator he is entitled to take and receive the proceeds of the said bonds, for the use of the legal representatives and distributees of the said Mary, the said George never having in his lifetime either reduced them into possession or recovered judgments thereon; and as such administrator he has demanded to receive them of the executors of said George, who have refused to deliver them over until the right to them shall have been decided. Wherefore, in order that complete and speedy adjustment of the respective claims may be had, and said bonds conveyed to the parties entitled to receive them, the bill prays for a subpœna, &c., and for an order directing

the defendants, as executors of said George Crane, to pay over and deliver to the complainant, as administrator of the said Mary, the said bonds, to be by him recovered and collected for the benefit of her representatives and distributees, and for general relief.

The answer of the executors, filed on the 28th of March, 1850, admits the intermarriage and death of the husband and wife, their appointment as executors of the husband, and the grant of letters testamentary to them, as well as letters of administration on the estate of the wife, as charged in the bill, and then states that they found among the papers of their testator certain bonds for a large sum of money, copies of which are filed with the bill; said bonds are for the amounts specified in said copies, and are drawn in favor of Mary Gough and her assigns, and so far as respondents know have not been paid, except insomuch as shown by the credits thereon, nor have judgments been obtained upon them. But these respondents aver and allege, that prior to the intermarriage between the said George Crane and the said Mary Gough, the said bonds were, in consideration of the marriage which was about to be solemnized between them, and which did take place on the 3d of September, 1846, given by the said Mary Gough to the said George Crane, and that in accordance to said gift and agreement, the said bonds were delivered to the said George Crane, and remained in his possession up to the time of his death, which happened in August, 1849.

And these respondents also aver that the said bonds, in consideration of the approaching marriage between the said George Crane and the said Mary Gough, and which said marriage did take place at the time aforesaid, were by the agreement of the said Mary Gough with the said George Crane to become the property of the said George Crane at the time of his intermarriage with her, and that in consequence of said agreement and the said marriage, the said bonds came into the possession and did become the property of the said George Crane, and that these respondents, as his executors, are now entitled to have and receive the proceeds of them as a part of

the personal estate of their testator. That the original bonds have been filed for safe keeping in the office of the register of wills of St. Mary's County, and they have refused to deliver them to the complainant until the right, if any he has, is determined in the premises.

These respondents, therefore, believing and having been advised that they have a right to said bonds, and that they are entitled to receive as executors as aforesaid the proceeds of the same, pray the Court to decree accordingly, and that the complainant, as administrator as aforesaid, be ordered and directed to endorse said bonds to respondents, so that they may be enabled to proceed at common law to recover the amounts due upon them from the respective obligors; and to pass such decree in the premises for the full and entire settlement of the matter and relief of respondents as may be just and equitable, and decree to them their reasonable costs, &c.

On the 22d of June, 1850, by agreement of parties the general replication was entered, and a commission issued to take testimony.

Under this commission, returned on the 4th of January, 1851, it was proved on the part of the defendants, by Mrs. Sarah Drury, a competent witness, that about three weeks before Mrs. Gough's marriage to Colonel Crane, the latter remained all night at the house of a Mrs. Smith, where Mrs. Gough was staying, and Mrs. Gough came into Mrs. Smith's room, and said to Mrs. Smith and witness that she and Colonel Crane had made a bargain. Witness asked her what the bargain was. Mrs. Gough replied, that she had given all her notes for her money to Colonel Crane, and he promised to give her the interest of them as long as she lived, and that she had said to him, "Colonel, you know that when I die it is all yours." Witness has often heard Mrs. Gough declare, before her marriage to Colonel Crane, that she wished no one to have her property except Colonel Crane and his children. That Mrs. Gough, during the same conversation detailed above, observed that she and Colonel Crane were going to be married in a few weeks, and they were married shortly thereafter.

In answer to a cross-interrogatory by complainant, whether, when Mrs. Gough spoke of giving up her notes to Colonel Crane, she did or not state that it was a part of the bargain she spoke of, that she was to give up the notes to Colonel Crane upon her marriage with him, and he was after that to allow her the interest of them, witness replied:—Mrs. Gough said she had given up the notes to Colonel Crane, and he was to allow her the interest of them as long as she lived; and that she and Colonel Crane were going to be married, and she wanted no one else to have her property except Colonel Crane or his children. In answer to another cross-interrogatory, Do you know in whose possession the notes Mrs. Gough spoke of were up to the time of her marriage? if yea, state how you know it, witness replied:—In her own possession, and that a day or two before the conversation before spoken of, Mrs. Gough stated to Mrs. Smith, in my presence, that she held the notes in her own possession, (here defendant's counsel objected to the answer of the witness,) and that she meant to keep them until her marriage with Colonel Crane. Witness further stated, that she knew nothing about the engagement of the parties to be married before the time of the conversation first above spoken of.

Doctor C. M. Jones, one of the obligors in the bonds spoken of, proved that Colonel Crane called upon deponent shortly after the death of Mrs. Crane, for the payment of his notes or bonds, and that he did subsequently pay to Colonel Crane interest and a portion of the principal, as will appear by reference to said notes or bonds. And further, that when Colonel Crane called upon him for such payment, he, Colonel Crane stated that the notes or bonds were his property, and unless deponent agreed to pay him, he would bring suit against deponent at the ensuing March Court for the recovery of the same.

Doctor J. M. Broome, also an obligor in one of the bonds, proved that shortly after the death of Mrs. Crane, Colonel Crane called upon deponent for the payment of a part of his bond, which had been given to Mrs. Mary Gough before her

marriage with Colonel Crane, and that he, Colonel Crane, claimed said bond as his property.

Doctor Randolph Jones proved that on one occasion Mrs. Gough, before her marriage with Colonel Crane, came to deponent's house, when deponent tendered her payment of a note which she held against him, which payment she refused, stating that she was shortly to be married to Colonel George Crane: that there was an agreement between her and Colonel Crane, that he, Colonel Crane, was to have all her bonds and notes, and that he was going to allow her the interest of them for pin money. This was about three weeks prior to her marriage to Colonel Crane; and that they were married about three weeks after this conversation. In answer to an additional interrogatory by defendants, whether he had any conversation with Mrs. Crane subsequent to her marriage, and what it was, this deponent stated that he had a conversation with her the second or third day after her marriage, in which she referred to a locket she then wore, stating that that locket was all the property she then had; that she had given her notes and negroes to the Colonel, meaning Colonel Crane, to whom she pointed, and that she would be no longer subject to the harassments of collecting money and hiring out negroes. She also stated that she had no relations that cared for her, and that she had rather that Colonel Crane's children should have her property than any one she knew of. To another interrogatory, whether deponent had any conversation with one Mark Ford, now dead, relative to the delivery of certain papers to Colonel Crane in his presence by Mrs. Crane, and what it was? Witness replied, he had. Mark Ford is dead. He stated to me before his death, on the day after the marriage of Colonel Crane with Mrs. Gough, when he came to me in my field, that he had witnessed the marriage of Colonel Crane with Mrs. Gough. And that he further remarked to witness, that "Old Crane was worth ten thousand dollars more now than he was this time yesterday morning." Witness asked him how he knew? He replied; "I have just seen Mrs. Crane (the bride) give to Colonel Crane a bundle of papers, saying, 'Colonel,

this is your property;' and that a portion of the said papers were in the handwriting of Mr. B. G. Harris." Witness knew, of his own knowledge, that the notes given by Dr. C. M. Jones, his father, were in the handwriting of said Harris.

The complainant then, on the 4th of November, 1851, filed exceptions to this testimony. 1st. To the testimony of Mrs. Sarah Drury, because it only tends to prove a parol agreement never executed. 2d. To that of Drs. C. M. Jones and Broome, because it details conversations and statements of defendant's testator out of the presence and hearing of the complainant or his intestate. 3d. To the testimony of Dr. R. M. Jones, so far as it relates to information derived from Mark Ford, because it is evidence of the declarations of a third party, made out of the presence of complainant and his intestate. 4th. To the entire testimony of said Jones, relating to his conversations with Mrs. Gough before her marriage, because it only tends to establish a parol agreement unexecuted; and 5th. To the testimony of said Jones, relating to his conversation with Mrs. Crane after her marriage, because it is only of declarations made by complainant's intestate after marriage, and not necessarily tending to prove any ante-nuptial agreement.

The cause came on for hearing at March Term, 1852, and after the argument was commenced, the defendants filed the following exception.

"The defendants in this case except and object to the jurisdiction of the Court in this case to grant any relief to the complainant by his bill filed in this case, because he hath complete remedy at law for all the rights he sets up in the bill."

On the 23d of March, 1852, the Chancellor passed a decree, directing the defendants to deliver up the bonds in controversy to the complainant; accompanying which he delivered the following opinion:]

THE CHANCELLOR:

Putting aside the ante-nuptial agreement set up by the answer, it is perfectly clear that the securities which form the

subject of the controversy, are the property of the complainant as administrator of Mary Crane.

These securities consist of certain sealed notes which were given to and held by Mary Crane, then Mary Gough, prior to her intermarriage with George Crane, the testator of the defendants; and though by the marriage they devolved upon him *jure mariti*, and he might have reduced them to possession during their joint lives or after her death, he surviving her, and thus made them his property, yet, having failed to do so, or to recover judgment upon them, or to alter the security, they, according to our Act of Assembly, upon his death, devolved upon her representative. Act of 1798, ch. 101, sub. ch. 5, sec. 8. The Act of Assembly of this State changing in this respect the rule founded upon the English statute of distributions, which gives to the representatives of the husband who survived his wife, her *choses in action* not reduced to possession to the exclusion of the representatives of the wife. 2 *Kent's Com.*, 136. If, to be sure, the husband in his lifetime had reduced these *choses in action* to possession, or had obtained judgment upon them at law, or in equity, either in his own favor or in favor of himself and his wife, and he had survived her, his representatives, he subsequently dying, would have been entitled; but as he did neither, and the securities remained unchanged, and as they were originally her property, her representatives are entitled to them. *Leadenham* vs. *Nicholson*, 1 *H. & G.*, 267.

All this is quite plain and undisputed, but the answer in this case takes the ground, and counsel have urged in argument that the *ante-nuptial* contract, which it is insisted was made between Mr. and Mrs. Crane, has entirely changed the relative rights of the parties. And that in virtue of that agreement, these securities, it is said, now belong to, and should be recovered and enjoyed by the representatives of the husband.

The answer, after admitting the facts stated in the bill, alleges, "that prior to the marriage between the parties, the said bonds were in consideration of the marriage which was about to be solemnized between them, and which did take place on the 3d of September, 1846, given by the said Mary Gough

to the said George Crane, and that in accordance with said gift and agreement, the said bonds were delivered to the said George Crane, and remained in his possession up to the time of his death, in August, 1849." Again, "that the said bonds in consideration of the approaching marriage between the said George Crane and Mary Gough, and which said marriage did take place at the time aforesaid, were, by the agreement of the said Mary Gough with said George Crane, to become the property of the said George Crane at the time of his intermarriage with her, and that in consequence of said agreement, and the said marriage, the said bonds came into the possession and did become the property of the said George Crane, and that respondents, as his executors, are now entitled to them."

The defence, therefore, assuming that the objection to the jurisdiction of the Court is not well taken, is put upon the ground of an *ante-nuptial* agreement, by which it is alleged that these *choses in action* became upon the marriage the absolute property of the husband, and now should pass to his representatives.

The agreement relied upon in the answer not being in writing, cannot be set up as an objection to the title of the plaintiff unless there is something in the circumstances of the case which will relieve it from the operation of the statute of frauds, which declares that no action shall be brought whereby to charge to any person upon any agreement made in consideration of marriage, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party, &c.

The circumstances relied upon here to save this case from the operation of the statute is part performance, and this part performance is the marriage itself and delivery of the bonds to the husband, those being the acts of performance set up in the answer. But it is clear and incontestable that the marriage itself standing alone is no part performance within this clause of the statute for reasons which are strongly stated in the case of *Moutacute* vs. *Maxwell*, 1 *Peere Wms.*, 618. In that case it will be found that the circumstances supporting the promise which was made by the intended husband to the wife to allow

her to enjoy her own estate to her separate use, were infinitely stronger than any which exist in this, and yet the Lord Chancellor held the plea of the statute good, and refused to enforce the agreement, and though subsequently, and when by an amended bill circumstances were stated from which it appeared that the agreement was designed to be reduced to writing, but this was prevented by the fraud of the husband, the Court overruled the plea and directed the defendant to answer, saying, that the fraud might entitle the plaintiff to relief, yet the doctrine, that if the parties rely wholly upon the parol agreement neither can compel the other to a specific performance is expressly reasserted; and it was also again declared, that if the marriage could be considered as an execution of the contract to take the case out of the statute, the clause in question would be a perfect nullity. 1 *Eq. Cases Abr.*, 19; *Prec. in Ch.*, 526; *Roberts on Frauds*, 196, 197, 198.

Supposing, therefore, that there was a parol contract between Mr. and Mrs. Crane prior to the marriage that these moneyed securities should in consideration of marriage become the property of the husband, and that the only act of performance is the marriage itself, it is clear upon authority, that if the agreement remains unexecuted, this Court has no power to decree its specific performance, in opposition to the statute of frauds. It is true, this is not a bill by the representatives of the husband asking the Court to decree an execution of this contract against the representatives of the wife, and resisted by them as an invasion of the statute of frauds, but to the bill of the representatives of the wife, praying to have these securities restored to them by the representatives of the husband the latter set up the parol agreement, which has been referred to, and seek protection under it; and the plaintiff, by exception, objects to this defence, and the testimony in support of it, upon the ground that it tends to establish an unexecuted parol agreement; and this, as it appears to me, presents the question whether the contract relied upon can be proved by parol in opposition to the statute of frauds. It is undeniable, as has been already said, that upon our statute, and upon the

decision of our courts, the right of property is in the plaintiffs, and that a Court having jurisdiction of the subject would be required to restore them to their possession, unless some valid contract is shown by which the rule of law is changed.

It is urged, however, that not only did the marriage take place pursuant to the contract, but the intended husband was put in possession of the securities, and held them until the period of his death, in 1849; and the case of *Duvall et al.* vs. *Gittings et al.*, 3 *Gill*, 138, is relied upon as showing that these circumstances are sufficient to take the case out of the statute. That case undoubtedly does prove that an agreement by parol made by a father with his daughter in consideration of her marriage, and as a marriage endowment, is founded on a valuable consideration, and that upon the consummation of the marriage, and the delivery of the possession of the property to the daughter, the case is taken out of the operation of the statute, and will be enforced in equity. In the case of *Cannel* vs. *Buckle*, 2 *Peere Wms.*, 243, it was held by Lord Macclesfield, that a bond given by a woman to her intended husband, that in case of their marriage she would convey her land to him, would, after the marriage, be enforced in equity, though the bond is void at law, and this case is cited with approbation by Mr. Justice Story. 2 *Story's Eq.*, *sec.* 739. The case of *Acton* vs. *Peirce*, 2 *Vernon*, 480, is to the same effect, and proves that a bond given to the wife by the husband before marriage, to leave her one thousand pounds, though extinguished at law by the marriage, will be enforced in equity, and numerous cases cited in the notes confirm this position.

Considering, therefore, the agreement as resting upon a valuable consideration, and that if in writing it would be enforced in a Court of Equity, and though unlike in some essential features, the case of *Dugan* vs. *Gittings*, it might be extricated from the operation of the statute of frauds if attended with some other circumstances which existed in that case, it remains to be seen whether the circumstances are the same in substance, because if substantially the same, a difference in detail or particulars cannot vary the principle applicable to them.

In the case of *Dugan* vs. *Gittings*, there was not a shadow of doubt of the agreement and the delivery of the possession of the property to the daughter in pursuance of the agreement. The Court speaks of the agreement to give in consideration of the marriage, and the delivery of the possession under the contract as being supported "by a mass of proof which it was impossible to resist." And they say that the performance of the consideration, and the change of possession under the contract are ingredients which, when combined, have always been regarded as relieving the parol agreement from the operation of the statute. But in this case there is no legal admissible testimony of mutual promises to marry, all the proof upon that subject being found in the declarations of the lady made in the absence of the husband, and it is only from the fact that the marriage did in fact take place shortly after the date of the conversations, that the agreement of the parties to be married can be inferred.

Conceding, however, that the circumstances are sufficiently strong to infer a mutual promise to marry, it is very clear that there is no evidence to bind the husband to the terms of the agreement, as stated by the wife to the witnesses. These terms were, that there was an agreement between her and Colonel Crane. "That he, Colonel Crane, was to have all her bonds and notes; and that he was going to allow her the interest of them for pin money." This is the proof of one witness. The other witness proves that Mrs. Gough said, "that she and Colonel Crane had made a bargain. Witness asked her what the bargain was; and she replied, that she had given all her notes for her money to Colonel Crane; and he promised to give her the interest of them as long as she lived." Now, with regard to this part of the contract, which is unquestionably very material, because it essentially impaired, if it existed, the marital rights of the husband, there is no proof whatever other than the declarations of the woman made in the absence and out of the hearing of the husband. And it cannot therefore be pretended that, if the positions of these parties were changed, and she was asking the Court to enforce the contract,

it could not be done. And not only is there no proof that any such agreement was made by Colonel Crane, but there is no pretence that it ever was performed by him. His right, or the right of his representatives to enforce this contract, rests exclusively upon the fact of the marriage and delivery of the bonds to him as asserted by the answer. But the marriage, as we have seen, is no such part performance as will rescue the agreement from the operation of the statute; and an examination of the proof will show that the delivery of the possession of the bonds cannot be traced with any degree of certainty to the agreement relied upon in the answer. It is certainly, to say the least, very doubtful, whether the securities were delivered to the husband prior to the marriage. On the contrary, my impression is very decided that Mrs. Gough retained them in her own possession until after that event. It is true, in her conversation with Mrs. Drury, which occurred about three weeks prior to the marriage, she says she *had* made a bargain and *had given* her notes to Colonel Crane; but making a bargain and giving do not always or necessarily infer the parting with the possession of the thing given; and upon cross-examination, the same witness expressly says: Mrs. Gough retained the notes in her own possession up to the time of the marriage. And there is not a scintilla of evidence other than what has been mentioned above to prove the contrary. That Colonel Crane should be in possession of the notes after the marriage, is of course consistent with the relations which then subsisted between them, and surely cannot be referred exclusively to the agreement. After the marriage, unless there was some agreement to the contrary, she had no right to withhold them from him.

The proof in this case, therefore, falls far short of the evidence in that of *Dugan* vs. *Gittings*, and I entertain a strong conviction that if the husband or the husband's representatives were here as plaintiffs, asking this Court specifically to enforce the agreement, the application would be unsuccessful.

It has been repeatedly decided by this Court, and the principle is believed to be too firmly settled to be shaken or drawn

in question, that to take a case out of the statute of frauds on the ground of part performance, the plaintiff must make out, by clear and satisfactory proof, the existence of the contract as charged in the bill. And the act of part performance must be of the identical contract set up by him. *Owings* vs. *Baldwin and Wheeler*, 1 *Maryland Ch. Decisions*, 120, afterwards affirmed on appeal to the Court of Appeals; *Beard* vs. *Linthicum*, *ib.*, 345. It is impossible to dispute the principle, and the disinclination of the Courts to make further inroads upon the statute by excepting cases from its operation is apparent in all the recent cases. *Philips* vs. *Thompson*, 1 *Johns. Ch. Rep.*, 131; *Parkhurst* vs. *Van Cortlandt*, *ib.*, 284. The disposition is rather to retrace the steps which have been taken in what is now considered the wrong direction, but at all events, if this is not so, a firm determination exists to make no further relaxation of the statute.

It is quite true that in this case the representatives of the husband did not come into the Court asking it to interfere actively to compel the specific performance of the contract set up in their answer. They are here as defendants, and seek to defend themselves against the claim asserted in the bill, upon the ground of an agreement, by which they insist that the property in dispute belongs to their testator; and it is urged, that upon a principle recognised by this Court, they will not under such circumstances be required to exhibit as strong a case as would be required of them if they, as plaintiffs, were invoking the active interposition of the Court in their behalf. 2 *Story's Eq.*, *secs.* 769, 770, 771. If the plaintiff in this case was seeking to enforce the specific performance of a written contract against them, grounds of defence would be open in opposition to such application, which would not avail them if they as plaintiffs were asking the aid of the Court, because chancery when called upon to exert its extraordinary power to coerce the specific performance of contracts, acts with less restraint than when exercising its ordinary jurisdiction, and will not interfere, unless satisfied that the application is just and reasonable in all respects. *Waters* vs. *Howard*, 1 *Maryland*

Ch. Decisions, 112. In the exercise of a sound judicial discretion, the Court will not be active in specifically enforcing claims, not under the actual circumstances just between the parties, but will turn them over to another tribunal, where such damages may be awarded as in the estimation of a jury may be reasonable and proper. 2 *Story's Eq.*, *sec.* 770.

But in this case the plaintiff is not asking the Court to enforce the specific execution of a contract made by the original parties, nor are the defendants attempting to defend themselves against any such claim by proof that the granting of the application would be contrary to the principles of justice. No application is made to the Court for the execution of its extraordinary jurisdiction, when it may or may not interfere, in the exercise of a sound but not unlicensed discretion, and when, freeing itself from those strict rules which usually prevail in the administration of justice, it may look at circumstances which otherwise it would not be at liberty to consider, and ascertain whether the demand made upon it is fair and reasonable in all respects, and act or refuse to act accordingly.

The plaintiff is not here asking the Court to enforce a contract between these parties. He comes before the Court upon a clear and acknowledged title, not founded upon convention, but upon admitted law, and asks the Court to restore to him rights which by the law he is unquestionably entitled to. The defendants meet this demand by setting up a parol contract, which being by parol is void under the statute of frauds, and ask that they may be allowed to take shelter under it, because it has been in part performed. Now, it appears to me that under such circumstances, the defendants should be held to the same clear, definite, and unequivocal proof of the contract set up in the answer as would be required of them, if they, as plaintiffs, were asking for its specific performance. There surely is, in this case, no reason why the rule which requires that the identical contract laid in the bill shall be proved, when the operation of the statute of frauds is sought to be avoided upon the ground of part performance, because, being presented in the answer, the plaintiff is deprived of the opportunity which

he would enjoy of denying it upon oath if the relative position of the parties was changed.

It is said, however, that the proof makes out a clear case of intention, and that this Court has the power and will cure the defect, and execute the contract according to the intention of the parties. There can be no doubt in this state, that chancery will receive parol proof to reform a written contract so as to make it correspond with the real intention of the parties, and then decree its specific execution as rectified. *Moale* vs. *Buchanan*, 11 *G. & J.*, 314. Thus repudiating the doctrine that parol evidence of mistake could only be offered by the defendant to rebut an equity. But this is not a case in which parol evidence is offered to rectify a written contract upon the ground of fraud, surprise, or mistake. The contract here is by parol, and void; and if the intention of the parties was ever so clearly expressed, it would be no better. It would still be void for want of writing, and no reformation of it by this Court can make it otherwise. It follows, therefore, that in my opinion the defence cannot be maintained, and that the plaintiff must have relief if this Court has jurisdiction to give it to him.

The objection to the jurisdiction is for the first time taken at the hearing, and after the argument had commenced, and though I do not deem myself at liberty to disregard it on that ground, it certainly furnishes a reason for looking with some degree of disfavor upon it. Prior to the passage of the Act of 1841, ch. 163, an objection to the jurisdiction of this Court might be taken in the Court of Appeals, though the defendant had wholly omitted to place his defence upon that ground in the Chancery Court, so that it frequently happened that parties who had meritorious claims if prosecuted in the proper forum, lost them by having an exception to the jurisdiction sprung for the first time in the Appellate Court, when, if the objection should be sustained, limitations or loss of evidence would be fatal to a recovery upon being compelled to sue at law. The Act referred to was to cure this evil; and though it does not apply to this Court, or require the defendant to object to its jurisdiction at any particular stage of the cause,

its policy, and the manifest justice of the provision may be permitted to have some little influence when a question not free from doubt is presented. The Court was called upon in the case of *Hughes* vs. *Jones*, 2 *Maryland Ch. Decisions*, 179, to consider this subject, and it was then said, that if "the want of jurisdiction is apparent, the delay, and the circumstances under which the objection was made, must be disregarded, however severely it might operate; but if there be any doubt upon the subject, the Court may surely take these circumstances into consideration, and be induced by them to give unwilling heed to the objection." In this case, the answer rests the case upon the merits disclosed by it, and the general replication was entered, and a commission by consent of parties was issued to take proof more than two years ago. But in addition to this reason why the Court should not now lend a willing ear to the objection to its jurisdiction, it is by no means certain that the plaintiff has that plain, adequate, and complete remedy at law which should deny him the aid of Chancery.

The action of trover would only enable him to recover damages for the demand and refusal, and the plaintiff had no authority to make the demand until after he took out letters of administration in December, 1849, which would fall far short of his recovery under this bill if he succeeds in getting a decree. *Fishwick* vs. *Sewell*, 4 *H. & J.*, 394. Besides, in the action of trover, he recovers only damages against the defendants, giving him a personal demand against them, which it must be obvious may be a much inferior security, to a decree which shall direct a specific delivery of the bonds and notes to the complainant. If replevin is brought, the complainant must give bond with surety for a large sum of money, which in many cases may be extremely inconvenient, and in some impossible; besides, that it would be requiring of an administrator to assume a personal responsibility, which should not be lightly demanded of him. This circumstance, it will be seen, had some weight attached to it in the case of *Hughes* vs. *Jones*, already referred to. Besides, even if replevin were brought, and the notes under it delivered to the complainant, the defendant upon

giving a *retorno habendo* bond would have them restored to him, and his claim to the specific thing converted probably into a personal demand upon the bond in the event of his succeeding in the action.

In *White's Equity Cases*, 65, *Law Lib.*, 545, many cases are collected establishing the principle that a Court of Equity will decree a specific delivery up of deeds or writings to the persons legally entitled to them; and in *Jackson* vs. *Butler*, 2 *Atk.*, 306, where mortgage deeds delivered to a person for the purpose of receiving the principal and interest due on them had been pawned by him, were decreed to be delivered up by the pawnee, Lord Hardwicke observing, that the plaintiff might have had an action of trover, but then he could only have had damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

Under all the circumstances of the case, therefore, I shall decree the specific delivery of these notes. It appears to me at least doubtful whether the plaintiff has that plain, adequate, and complete remedy at law which will preclude the interposition in his favor of this Court; and seeing that the objection was not made until after the argument of the cause had commenced, which, though not of itself a sufficient reason for refusing altogether to listen to it, is a reason why the Court should lean against it, and I am not disposed now to yield to it. But though the decree will be for the plaintiff, the costs will not be thrown upon the defendants, who in resisting the claim made upon them, acted in the proper discharge of their duty.

J. M. S. Causin, for Plaintiff.
Geo. Brent, for Defendants.

[An appeal was taken in this case, which is still pending.]

JOHN A. THOMPSON, TRUSTEE IN INSOLVENCY OF GEORGE S. DAVIS,
vs.
DANIEL B. BANKS.

DECEMBER TERM, 1849.

[ABSOLUTE DEED DECLARED A MORTGAGE—FRAUD.]

UPON proper averments and sufficient evidence, a Court of Equity will treat an absolute deed as a mortgage, and decree a redemption by the mortgagor, or a sale for the purpose of paying the sum due.

Where a bill alleges that a deed, absolute on its face, was intended to be a mortgage, and was procured with the fraudulent design of setting it up as an absolute deed, contrary to the express agreement and understanding of the parties at the time of its execution, and the answer denies the fraud, the complainant must prove it by evidence, direct or circumstantial.

It is well established that fraud may be inferred from facts and circumstances; from the character of the contract, or from the condition and circumstances of the parties.

[George S. Davis executed a deed, dated the 25th of Sept., 1840, by which he conveyed, for the consideration of $500, certain leasehold estate to Daniel B. Banks absolutely. Said Davis afterwards, on the 6th of October, 1846, applied for the benefit of the insolvent laws, and John A. Thompson was appointed his permanent trustee, who, on the 3d of November, 1849, filed the bill in this case, attacking said deed upon the grounds stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

This case was argued before me during the sittings of the term by the solicitor of the complainant, and is now submitted under the rule.

The bill which is filed by the complainant as the insolvent trustee of George S. Davis, alleges that a deed executed by said Davis, on the 25th of Sept., 1840, and by which the grantor conveyed to the defendant, Banks, certain leasehold estate in the city of Baltimore, absolutely for the sum of five hundred dollars, was intended as a mortgage merely, to secure

the repayment of the sum, the same being at that time regarded by both parties as a loan. That the claim of the defendant now set up to hold the property as his own, is fraudulent, and the deed upon which this pretension is founded was procured with the fraudulent design of so setting it up in opposition to the express agreement and understanding of the parties at the time of its execution.

The charge, therefore, in effect is, that the $500, the consideration mentioned in the deed, was advanced by the defendant to Davis by way of loan, and that the instrument to secure its repayment, which was intended to be a mortgage, was procured by imposition, and is now used for a fraudulent purpose.

The answer denies the fraud, and the necessity of proving it by evidence, direct or circumstantial, is of course manifest, and has been conceded. That fraud may be inferred from facts and circumstances, from the character of the contract or from the condition and the circumstances of the parties, is well established. *Watkins* vs. *Stockett*, 6 *H. & J.*, 435; *Brogden* vs. *Walker*, 2 *H. & J.*, 285. And there can be no doubt that upon proper averments and upon sufficient evidence this Court may treat an absolute deed as a mortgage, and decree a redemption of the property by the mortgagor, or a sale for the purpose of paying the sum due. The case of *Brogden* vs. *Walker*, is a decision upon this point, such a decree having been passed in that case by the Chancellor, and affirmed upon full argument by the Court of Appeals.

The question, therefore, is whether in this case the facts and circumstances are of sufficient strength to justify the Court in coming to the conclusion that the deed in question was intended as a mortgage and not an absolute conveyance of the property. And upon a careful examination of the evidence and deliberately considering the facts and circumstances attending the case, the character of the contract, the condition and conduct of the parties, I do not see how the conclusion can be escaped that the instrument was designed to be a mortgage merely, and not an absolute conveyance.

There are in this case circumstances which repel the idea of

a sale; and there is besides direct evidence, of a character so strong, that in my judgment no reasonable doubt can be entertained upon the subject. I shall therefore send this case to the Auditor, with directions to state an account between the parties in the usual manner, and report the same to this Court for its further order.

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GEO. H. WILLIAMS, for Complainant.

DOROTHY E. DUNNOCK, BY HER NEXT FRIEND,
vs.
SAMUEL DUNNOCK AND LEVIN DUNNOCK.
} SEPTEMBER TERM, 1852.

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[ALIMONY—DIVORCE—PRACTICE—JURISDICTION.]

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UNDER the prayer for general relief, the plaintiff may have any relief consistent with the specific relief prayed, which may be warranted by the allegations of the bill.

Where the whole object of the bill and the specific relief prayed for is a separate maintenance or alimony to the wife, so long as the separation between her and her husband may continue, it may well be doubted if a divorce, *a mensa et thoro*, could be granted under the prayer for general relief.

Under the Act of 1841, ch. 262, and its supplements, alimony is an incident to the power of granting divorces, and cannot be awarded to the wife except as a consequence of the exercise of such power.

But the Act of 1777, ch. 12, sec. 14, giving the Chancellor as full authority in cases of alimony as the Ecclesiastical Courts have in England, is not repealed by the Act of 1841, ch. 262.

Upon a proper case, this Court will grant the wife alimony, or a suitable maintenance by the husband, or out of his estate, though a divorce, *a mensa et thoro*, be not asked for.

The wife under certain circumstances is entitled to alimony, to be paid by the husband, or out of his estate, but no case has been found where the Court, upon an application for alimony, has investigated the character of alienations of property made by the husband, so as to compel his alienee to pay the allowance to the wife.

A conveyance, though fraudulent as to creditors, is yet good against the grantor and volunteers claiming under him.

Though a husband cannot *by will* deprive his wife of her share of his personal estate, yet he has the power to dispose absolutely of such property during his life by sale or gift, and if he reserves no right to himself, the transfer will prevail against the wife, though made to defeat her claim.

But if the conveyance or transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her share of his personalty, it will be ineffectual against her.

Where a paper is never produced, nor its absence accounted for, its contents cannot be proved by parol.

A conveyance of personal property by a husband which would be good against the claim of the wife in case she survived him, is also good against her claim for a living during their separation.

According to the practice in this State, an objection for the want of jurisdiction may be taken at the hearing, though not presented either by plea, answer, or demurrer.

The Act of 1841, ch. 163, is confined in its operation to the Appellate Court, and the Court of Chancery may, *sua sponte*, refuse relief if it appear from the proceedings that it has no jurisdiction, though the defendant does not make the objection by the pleadings.

The fact that the complainant had previously filed her bill in the equity side of the County Court for a divorce and alimony, is an insuperable objection to the Court of Chancery granting her relief upon her bill there for alimony.

When two Courts have concurrent jurisdiction over the same subject-matter, the Court in which the suit is first commenced is entitled to retain it: the other has no authority to interfere, and will as soon as judicially informed of the pendency of the prior suit dismiss the subsequent proceedings.

[The facts of this case are sufficiently stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

This case, which has been fully and ably argued by the counsel on both sides, comes before the Court upon a motion to dissolve the injunctions granted upon the filing of the bill, which motion is met on the other side with an application for the appointment of a receiver, as prayed for in the bill, but held over for the coming in of the answer.

The bill, though it probably makes a case which, if sustained

by proof, would entitle the complainant to a divorce, *a mensa et thoro* does not pray for that relief, but simply that the property in question, sundry negroes, may be placed in the hands of a receiver, and that complainant, from the product of their labor, may have a reasonable allowance for her maintenance and support; or that they may be divided, and she have one-third thereof, whilst she and her husband, Levin Dunnock, are living apart. And the injunction which was granted was asked for to prevent a sale or other disposition of the property before the case could be heard.

Though under the prayer for general relief, the plaintiff may have any relief consistent with the specific relief prayed, which may be warranted by the allegations of the bill, it may, I think, be well doubted whether upon this bill a divorce, *a mensa et thoro*, could be granted. The specific relief prayed for, is a provision for the support of the wife during the period that she and her husband may be separated, either by awarding her a reasonable proportion of the hire of the negroes, or by giving her one-third of them, to be held during the separation. A separate maintenance or alimony, so long as the separation may continue, is the whole object of this bill. And so far from asking the aid of the Court to make that separation permanent, the door would seem to be designedly left open for reconciliation, and the restoration of the conjugal relations of the parties. Alimony, under the Act of 1841, ch. 262, which conferred for the first time upon this Court jurisdiction in divorce cases, is but an incident to the exercise of the power granted by that Act to divorce the parties. The language of the Act is, after authorizing the Court to grant either absolute or qualified divorces, according to the nature of the grounds stated and proved, "and in all cases where a divorce is decreed, the Court passing the same shall have full power to grant alimony to the wife," &c. And I take it to be very clear that proceeding upon that Act and its several supplements, alimony cannot be awarded to the wife, except as a consequence of the exercise of the greater power to pass a sentence of divorce.

This Act, as I conceive, is in conformity with what I under-

stand to be the rule in the English Ecclesiastical Courts, that alimony or a separate maintenance is never allowed but as a consequence of a divorce, *a mensa et thoro*. And that the Court of Equity there has no jurisdiction in cases of divorce, and will abstain from granting alimony until the separation of the parties has been decreed by the Ecclesiastical Court. This is not only the view of the subject taken by the late Chancellor in the case of *Helms* vs. *Franciscus*, 2 *Bland*, 565, but that of the Court of Appeals in *Crane* vs. *Meginnis*, 1 *Gill & Johns.*, 463. At page 474, the Court say, "That alimony is the maintenance afforded to the separated wife for the injury done her by her husband in neglecting or refusing to make her an allowance suitable to their station in life, and is treated as a *consequence* drawn from the divorce, *a mensa et thoro*." This the Court say is the conclusion to which they have come after a general review of the British law of divorce and alimony.

But by the Act of 1777, ch. 12, sec. 14, it is declared, "That the Chancellor shall and may hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the law of England in the Ecclesiastical Courts there." And it is urged, and I am not at all prepared to say that the argument is not a sound one, that this Act is still in force, and that the wife may not avail herself of its provisions, notwithstanding that under the Act of 1841, ch. 262, this Court, when granting a divorce, may as an incident thereto award her alimony. I do not suppose it was the intention of the Legislature in passing the latter Act, to compel the wife to sue for a divorce, whether she wished it or not. That is, that she must when abandoned or maltreated by her husband, either ask to have the sacred contract of marriage dissolved, or be denied the right to apply for a reasonable maintenance out of his estate to save her from suffering. She may have insuperable scruples against asking for the dissolution in whole or in part of a tie so solemn and sacred, and such scruples are certainly worthy to be respected, and when they exist deserve admiration rather than punishment. I therefore think, that in a proper case an application on the part of the

wife to be allowed alimony, that is, a suitable support and maintenance for herself and children by the husband or out of his property, would be favorably entertained by this Court, although a divorce, *a mensa et thoro*, was not likewise asked for.

But the bill in this case does not ask that alimony may be paid the complainant by her husband, or out of his estate. After averring the marriage, and that her husband abandoned her in the year 1849, and has not since returned, the bill proceeds to charge that the husband being possessed and having title to sundry negro slaves, undertook to convey the same to a certain Samuel Dunnock: that the instrument by which the conveyance was made, was obtained from her husband, who was of intemperate habits, and liable to improper influences by the undue importunities of his relations, and that although it purports to be for a valuable consideration, yet no such consideration was in fact paid, but that the design of the parties was to defraud the complainant of her right to a reasonable maintenance, and of all interest either present or prospective in the property. And the prayer is that the negroes may be placed in the hands of a receiver; and that from their hire a reasonable provision may be made the complainant, or that they may be divided, and she be allowed to take one-third thereof so long as the separation between her and her husband may continue. The bill also contains an allegation that the complainant has been left by her husband without any adequate means of support, and in destitute circumstances. And it is upon these allegations, of marriage, abandonment, destitution, and the imputed fraudulent character and motives of the conveyance, that the peculiar prayer for relief is prayed.

The instrument in question is a bill of sale of sundry negro slaves, executed for the consideration, as therein expressed, of twelve hundred dollars, paid by the grantee to the grantor, and the objection of an improper stamp having been used, being obviated in the mode pointed out by the Act of Assembly, it was then duly recorded in the proper office. This bill of sale is set up by the answer of Samuel Dunnock, the grantee,

as a *bonâ fide* and valid instrument, every allegation affecting its fairness being peremptorily denied; the answer averring that the respondent at the time of its execution gave the grantee his bill, obligatory for the amount of the purchase-money, of which he has since paid eight hundred dollars, and that he is ready and willing to pay the balance due thereon whenever lawfully required so to do.

The question, therefore, is not simply whether this complainant is entitled to a decree for alimony, or a separate maintenance out of her husband's estate, but the Court is called upon as a preliminary question to decide whether the impeached deed is fraudulent or not. No case has been cited, nor have my researches enabled me to find one, in which the Court when applied to to decree a separate maintenance to the wife, has engaged in an investigation into the character of alienations of property made by the husband, so as in effect to compel the husband's alienee to pay the allowance to the wife, which is precisely the object and prayer of this bill.

The wife under certain circumstances is entitled to alimony, or a separate maintenance, to be paid by the husband or out of his estate. *Helms* vs. *Franciscus*, 2 *Bland*, 568; *Ball* vs. *Montgomery*, 2 *Ves, Jr.*, 195; *Duncan* vs. *Duncan*, 19 *Ves.*, 395; *Mix* vs. *Mix*, 1 *Johns. Ch. Rep.*, 110. The decree of the County Court in the case of *Wallingsford* vs. *Wallingsford*, 6 *H. & J.*, 485, was reversed upon the ground in part that it did not direct an income to be paid for the maintenance of the wife out of the husband's estate, and that it did not create a personal liability in the husband to pay any sum of money.

The deed in this case is vindicated against the attack made upon it by the bill, upon the ground that it was executed for a *bonâ fide* and valuable consideration, and with no intent to defraud the complainant, or any other person or persons, of their just rights; and a number of witnesses have been examined on the part of the complaint, to prove by the declarations of the defendant, Samuel Dunnock, that the consideration was not paid. I do not, however, consider it necessary to examine into and decide upon the sufficiency of this evidence

to establish the voluntary and fraudulent character of the deed, which I should be compelled to do if a party was before the Court competent to impeach it. There can be no doubt, of course, that, however the conveyance might be successfully assailed by a creditor of the grantor, it is good against him, and volunteers claiming under him. And there is as little room to doubt that though a husband cannot by *will* deprive his wife of her reasonable share of his personal estate, he has the power to dispose absolutely of this description of property during his life, by sale or gift, and, if he thinks proper, gratuitously to part with his personal property in his lifetime, reserving no right to himself, then, though the transfer was made to defeat the claim of the wife, it will prevail against her. But if the conveyance or transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deny his widow that share of his personal estate which the law would assign to her, then it will be ineffectual against her. This was the conclusion to which I came upon an examination of the authorities in the case of *Hays* vs. *Henry*, 1 *Maryland Chancery Decisions*, 337.

In this case the bill of sale from Levin to Samuel Dunnock is absolute and unconditional upon its face, and the possession and control of the negroes appear to have gone along with the conveyance. In the deposition of *Stewart Vickers*, something is said about what the witness calls an off-set, which he says he slightly looked over, and by which Samuel was to return the negroes to Levin when he called for them, or forfeit $1200. This proof in regard to the paper called the off-set is objected to by the defendant's counsel, the paper not being produced or its absence accounted for, and it is very clear that without producing it or accounting for its absence, its contents could not be proved by parol. The same witness further proved that Levin "did not say whether he had or had not received any money for the negroes;" "the way they talked (but I do not recollect the exact words) was that he had made a bill of sale of his negroes to deprive his wife of them; that he was going off, and did not know whether he would ever come here

any more or not, and if he did not return he wanted his mother and brother's family to have them." This conversation occurred in August or September, 1849, shortly after which Levin Dunnock must have left home, and the negroes then and ever since have been in the possession of the grantee in the conveyance.

The question then in this view of the case is, whether there is evidence in opposition to the plain terms of the deed to show such a reservation of right in the husband as would prevent its taking effect against the claim of the wife in case she survived him. It is not enough to show that the conveyance, assuming it to be without a valuable consideration, was made to defeat the claim of the wife; that the law allows the husband to do by gift, so far as his personal estate is concerned, provided there be no right reserved to himself, and it is not a mere fiction, by which, not divesting himself of the dominion over his property during his life, he attempts after his death to deprive her of her distributive share thereof. Taking the whole of this transaction together, as explained by this witness, I am unable to see that kind of reservation of right in the husband of the complainant which would defeat his unquestionable right to give away his personal property, to the prejudice of her claim to a distributive share after his death.

The bill of sale was absolute upon its face, the alienation was accompanied with the delivery of the possession, and no act was omitted by the husband to give full and complete effect to the transaction during his life. The off-set spoken of by the witness, supposing his evidence of its contents to be admissible, did not bind Samuel Dunnock to return the negroes to Levin when he should call for them, but to return them or forfeit $1200. And it is certainly reasonable to infer, from the declarations of Levin, deposed to by the same witness, that it was at least quite probable that he never would return again, or demand a redelivery of the negroes. The grantor then did not retain his dominion of the negroes, because the paper which he had taken from the grantee (assuming its contents are properly proved), did not bind the latter to return them, but to do so or pay $1200. And, moreover, the grantor made

known his determination then to leave the country, perhaps for ever, and has in point of fact gone away to parts unknown, and has never since been heard of. It is, therefore, I think, impossible to characterize this transaction as a "mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks, when he shall die, to deprive his widow of the share of his personal estate which the law would assign to her."

Assuming, then, as it seems to me may be done, that if the complainant should survive her husband, the conveyance made by him of these negroes would prevail in opposition to her claim for a distributive share of them under our act of Assembly, it would seem to follow, necessarily, that it must also be good against the pretensions set up by this bill. It would be difficult to maintain that a transfer which is sufficient to defeat the right which devolves upon the wife, upon the death of her husband—a right which he cannot take from her by his will—may yet be successfully impeached by her in his lifetime, upon the ground that he has abandoned and left her without support. So far from this being the case, the right to the share which the legislature thought fit to assign the wife upon the death of her husband, may be supposed to present stronger claims to judicial protection than a right resting simply upon judicial precedents, however well-founded they may be in principles of equity.

It is urged by the complainant's solicitor that the grantee in this bill of sale is a stranger to all the equities between the true parties, except so far as he is a party to the alleged fraud upon the rights of the wife, and consequently he cannot be permitted to question her equitable claim to a maintenance against her husband. But surely this stranger, as he is called, may be allowed to show that the conveyance taken by him is not a fraud upon the rights of the wife, either because it rests upon a *bona fide* and valuable consideration, or because, if merely voluntary, it is but the exercise of the husband's incontrovertible right, during his life, to dispose of his personal property as he pleases, independent of her concurrence, and for the purpose, if he thinks fit, of defeating her claim to it.

It is said, moreover, that the fate of this injunction depends exclusively upon the bill and answer, and that the answer raises no objection to the jurisdiction of the Court to decree maintenance, and authorities are cited to show that in ordinary cases the defendant is confined to defences set up in his answer. But one of the cases referred to by the complainant's solicitor proves, that though the defendant answer the bill, and issue be joined thereon, he may at the hearing object that the case made by the bill does not entitle the party to equitable relief. *Chambers* vs. *Chalmers, et al.*, 4 *G. & J.*, 438. And there would seem to be no doubt that, according to the practice in this state, an objection for want of jurisdiction may be taken at the hearing, though no such objection is presented either by plea, answer, or demurrer. The Act of 1841, ch. 163, provides that upon an appeal to the Court of Appeals, the party who was defendant in the Court below shall not, in the Appellate Court, be permitted to urge an objection to the jurisdiction, unless it shall appear by the record that such an objection was made in the Court below. But this act is restricted in its operation to the Court of Appeals, and I am quite satisfied that this Court may, *sua sponte*, refuse to grant relief if it be apparent from the proceedings that it has no jurisdiction, though the defendant does not think proper or may omit to make the objection by the pleadings.

There is, moreover, another objection to the relief prayed by this bill, and to the interposition of this Court in behalf of the complainant, for the purpose for which she has invoked its aid, and which is presented by the answer, and which appears to be insuperable. The answer alleges, that prior to the filing of the bill in this Court, the complainant filed her bill on the equity side of Dorchester County Court, praying to be divorced from her husband, and for alimony, which bill is still depending in that Court, and that, consequently, this Court has no jurisdiction in the premises, and a copy of the bill so filed in Dorchester County Court, duly authenticated, is filed as an exhibit with the answer. It thus appears that before the present bill

was filed, a Court of competent jurisdiction had possession of this subject of alimony. It is true Samuel Dunnock, the grantee in the bill of sale, was not a party to the bill filed in Dorchester County Court, but he might by an amended or supplemental bill have been made a party, and the question now raised between him and the complainant have been litigated in that Court. The question of the right of the complainant to alimony was distinctly presented by her bill in the County Court, and constitutes a part of the relief specifically prayed for, and it is undoubtedly competent to that Court to say whether she is entitled to that relief or not.

Suppose this Court, upon the bill which she has exhibited here, was to decree her alimony, or an allowance out of these negroes, or the fruits of their labor, and the County Court should, upon the bill depending there, decide that she has no such claim, there would be a clear conflict between the two Courts. To avoid this danger the rule is well established, that when two Courts have concurrent jurisdiction over the same subject-matter, the Court in which the suit is first commenced is entitled to retain it, and the other co-ordinate Court has no authority to interfere, and will, as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings.

The bill in the case of *Brooks* vs. *Delaplane*, 1 *Maryland Chancery Decisions*, 351, was dismissed in accordance with this principle, which in another case, subsequently decided, received the full sanction of the Court of Appeals. See case of *Albert and Wife* vs. *Winn & Ross et al.*, 7 *Gill*, 446.

Being of opinion, for these reasons, that the complainant cannot have relief here, I must dissolve the injunction, the case not having matured or been submitted for final decree.

James A. Stewart, and E. Griswold, for Complainant.
E. R. Hooper, and J. A. Spence, for Defendants.

[An appeal was taken from the order dissolving the injunction, passed in conformity to the above opinion, which is still pending.]

JOHN H. FALCONER,
Trustee in Insolvency of JOHN W. CLARK,
vs.
JOHN W. CLARK AND DAVID GRIFFITH.

July Term, 1852.

[INSOLVENT LAWS—FRAUDULENT CONVEYANCES—EVIDENCE—PRACTICE.]

To avoid a deed under the Insolvent Acts of 1812, ch. 77, and 1816, ch. 221, it is not enough that the grantee was insolvent at the date of its execution and that the grantee knew of such insolvency; but it is indispensable that the undue preference should be given "with a view, or under an expectation at the time, of taking the benefit of the insolvent laws."

Where a bill attacks a conveyance as fraudulent under these acts, it should contain an averment that the undue preference was made with such view and expectation.

The 1st sec. of the Act of 1834, ch. 293, is local in its operation and confined to the City and County of Baltimore, and its proviso prevents its application to cases where the grantee had not notice of the insolvent condition of the grantor.

The notice required by this act to vitiate the conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor: and the plaintiff, where the answer denies it, must prove such actual notice at the date of the deed.

The 2d sec. of the Act of 1845, ch. 139, condemns transfers though made at the request or on the demand of the creditor; but allows them to stand, unless made with a view and under an expectation of taking the benefit of the insolvent laws, as required by the Acts of 1812 and 1816: and where this intent is denied by the answer, the plaintiff must prove it.

The grantor in the deed was indebted to a partnership firm, which was indebted to G., one of the partners. G. purchased the property conveyed by the deed, and it was agreed that the purchase-money should be charged on the books of the firm to G. and credited to the grantor, which was done. HELD—

That K., another partner of the firm, was a competent witness for G. in a suit by which the validity of the deed was attacked by the creditors of the grantor.

A vendor selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed.

[The deed attacked by the proceedings in this case, was executed on the 6th of September, 1850, and the grantor, Clark, applied for the benefit of the insolvent laws on the 11th

of December of the same year, and the complainant John H. Falconer, was appointed his permanent trustee, who filed the bill in this case on the 15th of April following. The allegations of the bill and answers, as well as the facts of the case disclosed by the testimony, are all sufficiently set forth in the opinion of the Chancellor:]

THE CHANCELLOR:

The object of the bill in this case, which was filed on the 15th of April, 1851, is to vacate a conveyance executed by the defendant Clark to the defendant Griffith on the 26th of September, 1850, of certain leasehold property in the city of Baltimore, upon the double ground that it is void under the insolvent laws, and under the statute of Elizabeth.

It alleges "that at the time of the execution and delivery thereof, said Clark was largely indebted to the firm of Kramer, Mantz & Co., of said city, of which firm said Griffith was a partner at the time of said execution and delivery, and that said Clark and Griffith both knew that said Clark was insolvent;" "That said deed was executed and delivered to secure illegally to said firm the amount due to them from said Clark, and that said Clark and Griffith colluded to procure to said firm and to said Griffith an improper and unlawful preference over other creditors of said Clark, and to hinder said creditors from obtaining their rights in the matter."

The bill, it will be seen, does not allege that the deed was made "with a view or under an expectation of the grantor's being or becoming an insolvent debtor, and with intent thereby to give an undue and improper preference," which according to the construction of the Acts of 1812, ch. 77, and 1816, ch. 221, mean "with a view or under an expectation of taking the benefit of the insolvent laws," *Hickley* vs. *Farmers & Merchants' Bank*, 5 *G. & J.*, 377; the allegation simply being that the parties to the deed knew of Clark's insolvency, and that it was executed collusively to procure to the firm and to Griffith an improper and unlawful preference over the other creditors of the grantor. It might, therefore, well be doubted

whether looking alone to the provisions of those acts, it would be competent to the party successfully to assail this deed whatever might be the state of the proof, if exceptions had been filed to the averments of the bill. It is not enough under these laws that the grantor was insolvent at the date of the execution of the deed, and that the grantee knew of such insolvency; but it is indispensable that the undue preference should be given "with a view or under an expectation at the time of taking the benefit of the insolvent laws."

The bill in this case then not being framed to vacate the deed under the Acts of 1812 and 1816, but with a view rather to the 1st section of the Act of 1834, ch. 293, it becomes necessary to inquire whether the complainant has proved a case which entitles him to relief under the provisions of that Act? The Act declares "that when a deed, &c., is made with intent to prefer any creditor, &c., of the grantor, when such grantor shall have had no reasonable expectation of being exempted from liability, or execution, for or on account of his debts, without applying for the benefit of the insolvent laws, it shall be deemed to have been made with a view or under an expectation on the part of the grantor of being or becoming an insolvent debtor, and with intent thereby to give an undue and improper preference." But the proviso to this section, which has been adjudged to be local in its operation and confined to the city and county of Baltimore, *Cole* vs. *Albers and Runge*, 1 *Gill*, 412, declares that it shall not apply as against any person or persons claiming under the deed, &c., nor to any case where the creditor, or security taking the deed, shall appear not to have had notice of the condition of insolvency, as aforesaid, of the grantor. And it has been also adjudged, in the case referred to, "that by the true construction of the Act, the notice which is to vitiate the deed, is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor."

Assuming then that the plaintiff's title to the aid of the Court depends upon the 1st section of the Act of 1834, it is incumbent on him to prove that the defendant Griffith had

actual notice at the date of the deed of the insolvent condition of the grantor. The bill avers that Griffith and Clark both knew at that time that the latter was insolvent; but this averment is denied in the answers of both the defendants, in the most unequivocal and positive terms. That of Griffith "denies that he knew or had any reason to suspect at the time or before the execution of said deed, nor until some time thereafter, that Clark was insolvent and unable to pay his debts; but on the contrary, he avers that at and before the execution of the deed and for some time thereafter, he believed he was able to pay his debts and have a considerable surplus of property." And in opposition to this flat denial there is not, so far as Griffith is concerned, any evidence whatever. Circumstances have been relied upon, to be sure, in the argument to prove that some one of the members of the firm of Kramer, Mantz & Co., knew that Clark was in embarrassed circumstances; but there is nothing to show, or from which it can be fairly inferred against the positive denials of the answers, that Griffith was that person. The bill does not rely upon the knowledge of the firm, but upon the knowledge of Griffith. It charges such knowledge and collusion between him and Clark to procure the preference to the firm and to Griffith, and being met by the positive contradiction of the answer, relief can only be granted upon proof sufficient according to the law of the Court to overthrow the answer.

Looking to the pleadings and evidence in the case the plaintiff appears to me to have no ground to stand upon, if his title to relief depends upon the 1st section of the Act of 1834, ch. 293. But it is supposed he may call to his aid the Act of 1845, ch. 139. The 1st section of that Act, it is very clear, does not extend to the city of Baltimore; and I incline to think the 2d section is equally inapplicable. But suppose it be otherwise, the complainant's case is not improved by it. The 2d section of the Act does not alter the provisions of the Acts of 1812, ch. 77, sec. 1, and 1816, ch. 221, sec. 6, except that it declares the preference shall not be saved because made "at the earnest request, &c., of the creditor;" a provision being

probably introduced in consequence of the decision of the Court of Appeals in the case of *Crawford and Sellman* vs. *Taylor*, 6 *G. & J.*, 323, in which it was held that though the transfer to the favored creditor may be made with a view and under an expectation of taking the benefit of the insolvent laws, it will not be avoided if it was made upon the application of the creditor, because it could not then be regarded as a voluntary act.

But though the Act of 1845 condemns the transfer, though made at the request or on the demand of the creditor, it allows it to stand, unless made with a view and under an expectation of being and becoming an insolvent debtor and with intent to prefer, &c., that is, with a view and under an expectation of taking the benefit of the insolvent law, as required by the Acts of 1812 and 1816, and therefore is less stringent than the Act of 1834, which avoids the deed or transfer if the grantor had no reasonable ground for believing that he could be exempt from execution or liability for his debts without having recourse to the insolvent laws. In other words, that in the city and county of Baltimore the absence of such reasonable ground for believing he could be exempt from execution or liability for his debts, would avoid the transfer of the debtor as though it was made with the direct view of taking the benefit of the insolvent laws, provided the creditor knew of the insolvent condition of the debtor.

Conceding then that the plaintiff may call to his aid the Act of 1845, he must prove that when Clark executed the deed of September, 1850, he intended to take the benefit of the insolvent laws. Now, in the first place, he has not charged it in his bill: and if he had, the answer of Clark denies expressly his insolvency at the time of the execution of the conveyance to Griffith, and attributes it to causes which occurred subsequently. There is to be sure evidence that Clark was pressed for money at or about that time to meet his engagements; but it is altogether insufficient in my judgment to prove that he intended to take the benefit of the insolvent laws, and that with that view and under that expectation, and with intent to prefer Griffith, or the firm of which Griffith was a member, he

made the deed. The charge of collusion with Griffith to give him or his firm an unlawful preference, is expressly denied.

I should, therefore, hold that the plaintiff had failed in his case if Griffith had been a creditor of Clark, and the deed had been executed to secure the debt. But this is not the character of the transaction at all. The answers of both the defendants charge that the property was *sold* by Clark to Griffith; and the deposition of Samuel Kramer, one of the firm of Kramer, Mantz & Company, taken under the commission, fully sustains the answers. It is not material to inquire into the validity of the original agreement proved by Kramer, that when the firm trusted Clark to the extent to which they gave him credit it was upon his promise to let them have the house; because if the subsequent agreement with Griffith to sell it to him, and the sale actually made to him, was *bona fide*, as both defendants swear was the case, and as Kramer proves, the character of the original agreement between Clark and the firm is of no importance. Certainly the *bona fides* of the sale and conveyance to Griffith cannot be impeached because of the mode in which the purchase-money was paid. Clark was indebted to the firm and the firm was indebted to Griffith, and upon receiving the conveyance it was agreed that the purchase-money, $1300, should be charged to Griffith upon the books of the firm and credited to Clark, and this was done and so stands to the present time. The money of Griffith, therefore, in the hands of the firm, where there is no pretence it was not perfectly safe, was applied to the payment of Clark's indebtedness. It was, therefore, with his consent paid to his use, and is precisely the same thing in legal contemplation as if it had been paid directly to him. There is some discrepancy about amounts, but this I think is explained by the condition of the books, and does not affect the fairness of the transaction. There can be no doubt that Clark has received the whole consideration for the property, and no effort has been made to prove that it was not the full value of it.

But it is said that Kramer is not a competent witness, because, as the argument supposes, if Griffith loses the property

he will have a right to go against the firm for the money he paid for it. That is, that the charge to his account, made with his consent in September, 1850, when he received the conveyance, must be struck out, and consequently that Kramer is interested in supporting the conveyance. It is not said that there was any agreement to this effect, and I can see no ground upon which the law would imply one. As between Clark and Griffith it is very clear, that in the absence of fraud or misrepresentation there could be no recovery against the former, even on a failure of title, the rule being that a vendor selling in good faith is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Abbott* vs. *Allen*, 2 *Johns. Ch. Rep.*, 523; *Gouverneur* vs. *Elmendorf*, 5 *ibid.*, 79. In this deed there are no covenants, and there is no pretence that any fraud or misrepresentation was practised by Clark upon Griffith. If there is any fraud in the case (of which I see no evidence) it is upon the creditors of Clark, in which Griffith was a participant, and for that surely he can have no remedy.

But if there could be no recovery against Clark on a failure of title, upon what principle can Griffith be permitted to have recourse to the firm of Kramer, Mantz & Company for his money, if the deed to him is annulled? They certainly have not engaged to indemnify, if the title fails, and he can have no ground for going against them, except that they have together perpetrated a fraud upon the creditors of Clark, he, Griffith, being a most active party in its perpetration. This would be a strange ground for applying to a court of law or equity for relief. Kramer is no party to the cause; he is not liable for costs. The decree could not be used in evidence against him, and he could not be proceeded against by Griffith in the event of the failure of the latter, to sustain his deed, except upon grounds which would effectually close the door of the Court in his face. I regard him, therefore, as a competent witness, and being competent, he makes out a case which shows a *bona fide* purchase by Griffith, of the property in question.

I shall, therefore, dismiss the bill, but in consideration of the character in which the plaintiff sues, and thinking that

under the circumstances, he might reasonably have regarded it as his duty to bring the suit, I will not subject him to costs.

COLEMAN YELLOTT, for Complainant.
ST. GEORGE W. TEACKLE, for Defendants.

[An appeal was taken from the decree of the Chancellor, dismissing the bill in accordance with the above opinion, which is still pending.]

BEALE GAITHER
vs.
SUSAN GAITHER AND
ELLEN GAITHER ET AL.

DECEMBER TERM, 1851.

[TRUST—FRAUD—EVIDENCE.]

IF an heir or personal representative or devisee, whose interest would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances, either by words or silent assent, that his wishes shall be executed as though the provision were made, such assurance will raise a trust which will be enforced in equity on the ground of fraud.

If such trust be denied by the heir or devisee, it may be proved by parol, though the statute of frauds be relied upon as a defence.

But the Court will not interfere if there be any doubt or ambiguity in the evidence, and there is no case in which the party setting up such a provision has been successful, where a reasonable doubt in regard to the fact could be entertained.

In this case the will was executed in 1834, the testator died in 1836, and the person by whom the imputed assurance was alleged to be made died in 1849, and the bill was not filed until 1850. No reason for the delay was assigned, and the plaintiff entirely failed in producing clear and satisfactory evidence of the assurances set up in the bill. The Chancellor dismissed the bill.

Declarations of a grantor made since the execution of a deed, are inadmissible to impair the rights of parties claiming under it.

Declarations of a deceased attesting witness to a will, respecting the incapa-

city of the testator at the time of its execution, are admissible in evidence against the will, where the validity of the will is the question to be tried.

But the declaration of a deceased attesting witness as to the contents and operation of the will are inadmissible; the will must speak for itself: nor are they admissible to show that a fraud was practised upon the testator in obtaining the will.

Parol evidence is inadmissible to show that the draftsman of the will was mistaken, and the testator designed something not fully expressed.

[William Plummer executed his will on the 6th of September, 1834, by which he devised two tracts of land to Beale Gaither, "to him, his heirs and assigns for ever." The testator died in January, 1836. Beale Gaither, on the 4th of October, 1840, executed a deed by which, in consideration of natural love and affection, he conveyed various tracts of land, including that devised to him by said will, to his three daughters, Susan, Ellen, and Mary Ann, and died intestate, in the year 1849. On the 6th of June, 1850, the complainant, the son of said Beale Gaither, filed the present bill, in which it is alleged and charged, that said Plummer was about to execute his will, whereby he was about, and told said Beale Gaither that he designed to devise to complainant and his brother William, the said land in fee, but that on said Plummer's so stating his purpose and design, said Beale Gaither, who was the reputed son of said Plummer, told him that complainant and said William were then young, and unable to take care of themselves and of their property, and that it would be better to devise the said property to him, the said Beale, and the said Beale promised and agreed with the said Plummer, that if he would devise said property to him, he would, when complainant and said William became old enough to take care of it, give it to them, or that he would give it to them at his death. And that, upon the representation of the said Beale, and his said undertaking to hold the said property in trust for the benefit of complainant and said William, the said Plummer, relying upon the same, actually devised the said property to the said Beale, and to his heirs and assigns for ever. That it was the purpose and design of said Plummer

to devise said land to complainant and said William, and that he so told said Beale, and was prevented from making said devise by the persuasion and inducement of said Beale, who faithfully promised said Plummer that he would hold said property in trust for complainant and said William, and that but for such promise and undertaking of said Beale, the said devise would have been made by said Plummer to complainant and said William, and was in fact made to said Beale in trust for them. The bill contains various other averments relative to the possession of the property and the declarations of said Beale Gaither that he held it in trust for complainant and his brother William, &c., which it is not necessary to state. The prayer of the bill is that the deed of 1840 may be annulled and vacated, and the defendants required to convey said property to the complainant in fee.

Besides the complainant, the said Beale Gaither left surviving him his son, the said William, three daughters abovementioned, and two sons, Thomas and James, his heirs-at-law, all of whom were made defendants to the bill, and severally answered, denying the averments thereof fully and particularly. The evidence taken in the case sufficiently appears from the opinion of the Chancellor.]

THE CHANCELLOR:

The proposition of law upon which the complainant's case rests, and upon which he has placed it by his bill, appears to be well fortified by authority. That proposition is, that if an heir or personal representative or devisee whose interests would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances that his wishes shall be executed, as though the provision were made, such assurance will raise a trust which, though not available at law, will be enforced in equity on the ground of fraud. *Barrow* vs. *Greenough*, 3 *Ves.*, 152; *Mestaer* vs. *Gillespie*, 11 *Ves.*, 621; *Strickland* vs. *Aldridge*, 9 *Ves.*, 516; 1 *Story's Eq.*, *sec.* 256; 2 *ib.*, *sec.* 781. Cases establishing the principle could be multiplied to

almost any extent, but there is no necessity for collecting any more of them, as no opposing authorities have been cited, and the principle is not disputed.

And it may also be assumed to be equally well founded, that if the trust is devised by the heir or devisee, it may be proved by parol, though the statute of frauds is relied upon as a defence. 1 *Jarman on Wills*, 357; *Oldham* vs. *Litchfield*, 2 *Vernon*, 506; *Chamberlain* vs. *Agar*, 2 *Ves. & Beams.*, 262; *Colegate D. Owing's Case*, 1 *Bland*, 402. The title of the party in whose favor a provision has been omitted by reason of such assurances, to the aid of the Court, does not rest upon the mere ground of trust, because viewed in that light the statute of frauds would be an insuperable bar. His right to relief is founded upon the fraud, for as was said by Lord Eldon in *Strickland* vs. *Aldridge*, "the statute was never permitted to be a cover for fraud upon the private rights of individuals."

But though parol evidence may be admitted to prove the agreement of the heir or devisee in opposition to the answer, and the Court will decree relief if the proof be sufficiently strong, the cases show its undisguised reluctance to interfere if there be any doubt or ambiguity in the evidence. The Master of the Rolls in the case of *Barrow* vs. *Greenough*, 3 *Ves.*, 152, spoke emphatically of the danger of decreeing in such cases upon parol evidence only, and congratulated himself that he had in that case the required proof in the defendant's handwriting, remarking, that if he was compelled to decide the cause exclusively upon the parol proof, he could not grant relief. And upon examining the many cases which have been decided upon this head of equity, it will be found that in none has the party setting up such a provision been successful when a reasonable doubt in regard to the fact could be entertained.

In this case, in my opinion, the plaintiff has entirely failed in producing that clear and satisfactory evidence which is required, of which requisition there are circumstances peculiar to it forbidding the least relaxation. The will was executed in the year 1834, and the testator died in 1836, and Beale

Gaither, the elder, and the person by whom, if by any one, the imputed fraud was perpetrated, died in the year 1849. No reason is stated or appears why the bill was not filed between the years 1836 and 1849, when the elder Gaither was alive, and competent to defend his rights and his reputation. Instead of instituting his suit during that period, the complainant postponed it until the year 1850, being fourteen years after the death of the testator, and then relies upon loose and perhaps inaccurately-remembered declarations of Gaither, for the purpose of defeating the title of the parties claiming under him, under his deed of October, 1840. His declarations, made since that deed, are of course inadmissible to impair the rights of the parties claiming under it. This principle has been frequently adjudicated, and is not in this case understood to be denied, and excludes the testimony of several of the witnesses upon whom the plaintiff relies.

The answers, all of them, deny the statements of the bill, and some of the respondents speak in opposition to their interests, and, on that account, in so far as they speak of matters within their own knowledge, are entitled to more consideration than is usually attached to answers. Many of the averments of the bill refer to family transactions, which it is natural to suppose would have formed subjects of conversation in the family circle, and yet the defendants, all of them, deny or express their total ignorance or unbelief of them.

Upon attentively reading and considering the testimony adduced by the plaintiff, and putting out of view altogether the proof on the other side, I can see no ground upon which I could decree the relief prayed by this bill in opposition to these answers. The principle, it will be remembered, is, that the heir or devisee must have induced the testator or intestate to omit the particular provision by assurances that his wishes should be as fully executed as if the omitted provision was made, and even though it be conceded that such an engagement may be entered into not only by words but by silent assent, as in a case somewhat analogous was held by *Lord Loughborough*, in 4 *Ves.*, 10, and as was considered by *Lord*

Eldon, sufficient to raise a trust in *Paine* vs. *Hall*, 18 *Ves.*, 475, still this bill cannot be maintained, because, as I read the evidence, there is no proof of an assurance by Beale Gaither, either by express or silent assent, that if the testator would not make the provision set up by the bill, he would nevertheless execute his intentions as though he had made it. There is some proof, to be sure, that Gaither, the elder, advised the testator in regard to his will, but there is none which establish the indispensable fact, that he assured him he would fulfil what the bill charges to have been his intention with regard to the plaintiff and his brother William Gaither, if he would execute such a will as he did execute. The proof on the part of the plaintiff, moreover, is far from being in harmony with itself, with reference to the time when the title of the plaintiff in the property should commence. It is said by one of the witnesses that Beale Gaither, the elder, was to hold the property until his sons should be old enough to take charge of and manage it themselves, whilst one of them (the elder Benson) says Gaither, the father, was to have a life estate, and upon his death it was to go to his sons.

The declarations, then, of Beale Gaither, as deposed to by the several witnesses, even including those that appear to have been made since his deed of 1840 (which are, however, clearly inadmissible), are in my judgment wholly insufficient to establish the plaintiff's title to relief. They are not only vague and indeterminate, but they do not show, what must be shown before the complainant can have a decree, that the provision in the will which he alleges the testator was about to make in his favor, was prevented by the assurance of the elder Gaither, either expressly made or tacitly affirmed, that he would execute his intention in that respect, whether inserted in the will or not.

But in addition to the proof of the declarations of Beale Gaither, the elder, the complainant relies upon the evidence of Joseph Cole, who speaks of declarations made by Daniel Lamborne, the draftsman, and one of the subscribing witnesses to the will, he being now dead. This proof is excepted to by

the defendant, and, in my opinion, this exception is well taken. That the declarations of a deceased attesting witness to a will, respecting the incapacity of the testator at the time of its execution, are admissible in evidence when the validity of the instrument is the question to be tried, is not now an open question in this state. That such declarations may be given in evidence against the will, is settled by the case of *Townshend* vs. *Townshend*, 9 *Gill*, 506. But the principle upon which that case was decided, and the reasoning of the courts in the various cases relied upon by the Court of Appeals, in the brief opinion delivered by them, does not reach the present case. The point decided was, that you may give in evidence the declarations of a deceased subscribing witness to a will, that the party executing it was not at the time *compos mentis*, and the reason upon which this departure from the general rule is vindicated, is, that upon the death of the subscribing witness, proof of his handwriting establishes the fact of the sanity of the testator, and everything else essential to the validity of the instrument. The witnesses to a will being dead, upon proof of their handwriting, it will be admitted to probate, the principle being that the law places them around the testator, to try and judge of his capacity to perform the act about which he is engaged. This is the reasoning of the Court in *Harden* vs. *Hays*, 9 *Barr.*, 151, in which the authorities upon the subject in this country and in England appear to have been carefully and critically examined. And it would seem to be quite proper that when so much respect is paid to the mere attestation of the witness, that proof of it when he is dead involves the proof of every fact necessary to the validity of the will, his declaration of an opposite character should also be received. Why should the proof of the handwriting of the witness be equivalent to his oath,—to his oath that the testator was of sound and disposing mind—and his declarations to the contrary be rejected, because those declarations are not under oath? If the declarations are to be rejected because not sworn to, why should the attestation be received when no oath accompanies the act of attesting? And if the declarations are to be ex-

cluded because the party against whom they are offered is precluded from the opportunity of a cross-examination, the same objection should apply to proof of the signature of the attesting witness.

But the declarations of the subscribing witness in this case, are of a totally different character. The witness, Cole, says, "That after the testator's death, he had a conversation with Lamborne, (the subscribing witness), who drew the will. Lamborne appeared to be surprised that Gaither had conveyed the land to his daughter. He said that the land was left in trust, in said Gaither's hands, for the use of his boys." "He thinks this conversation with Lamborne took place after Gaither's death." This witness can only be understood to speak of the contents and operation of the will. He does not say that Gaither assured the testator if he would devise the land to him, he would hold it in trust for his sons; and that after this assurance, the testator executed the will in the form in which he drew it; but that the land was left in trust in Gaither's hands, for the use of his boys. He is not speaking of any deception practiced by Gaither upon the testator, but of the operation of the will, which of course must speak for itself, parol evidence being inadmissible to show that the draftsman of the will was mistaken, and that the testator designed something not fully expressed. *Negro Cæsar* vs. *Chew*, 7 *G. & J.*, 127.

If, however, these declarations of Lamborne, made to the witness, Cole, could be understood as the complainant's counsel understood them, that is, as tending to show a fraud practiced by Gaither in obtaining the will, upon what principle can they be received as evidence? They are declarations without oath, made by a subscribing witness, to be sure, but with reference to a fact having nothing whatever to do with his relation to the will, as an attesting witness. It could scarcely be contended, it is presumed, that if Lamborne had not been a subscribing witness, that his declarations upon this subject, made thirteen years after the death of the testator, or, indeed, if made at any time, could be admitted in evidence, and no good

reason is perceived why the circumstance of his being a subscribing witness, should make a difference. The declarations, as proved by Cole, are still merely hearsay, not offered as in the case cited from 9 *Barr*, 151, to disprove that which the proof of the handwriting of the deceased attesting witness established, to wit, that the testator was sane, but to prove another fact with which the proof of the handwriting of the witness had no connection one way or the other. The proof of the declarations, therefore, is not offered to contradict, or impeach, or lessen, the weight due to the attestation, but to set up a distinct and independent fact, with which the attestation has nothing to do. I cannot think it would be judicious or safe to make this a further exception to the general rule, which excludes hearsay evidence. The reasoning of the Supreme Court of Pennsylvania shows the importance of caution in breaking in upon the general rule. In that reasoning, and the vigilance and strictness which it inculcates, I entirely concur, and without the most apparent and urgent necessity, I should not be willing to introduce another exception.

For these reasons, and without going into an examination of all the proof, or dwelling on circumstances, from which strong presumptions arise against the complainant's title to relief, I am of opinion his bill cannot be supported, and shall sign a decree accordingly.

CORNELIUS MCLEAN, for Complainants.
A. RANDALL, for Defendants.

[No appeal was taken in this case.]

SAMUEL B. ANDERSON AND OTHERS,
vs.
ROGER TYDINGS AND OTHERS.

SEPTEMBER TERM, 1852.

[FRAUDULENT CONVEYANCES, VACATING OF, ETC.]

AT common law, a debtor may secure one creditor to the exclusion of others, either by payment, or a *bona fide* transfer of his property.

Where a deed was executed upon a moneyed consideration of $144, which was paid to the grantor, this constitutes it a deed of bargain and sale, and it may be supported, by showing that it was caused to be made by the grantor, in satisfaction of a debt due from him of an amount equivalent to the value of the property conveyed, this being a consideration, *ejusdem generis*, with that stated in the deed.

When a deed purports to be made for a moneyed consideration, it cannot be shown that money did not constitute the consideration, because that would be to change the character of the deed from a bargain and sale to a covenant to stand seized to the use of the grantee.

When a deed is charged to be fraudulent, and when the consideration stated in it has not been disproved, evidence of collateral circumstances showing an additional consideration not expressed in the deed, may be received to repel the charge of fraud.

In this case, a deed was executed to a married woman, for the consideration of $144, paid to the grantor by the husband. This deed was impeached by the creditors of the husband, on the ground that it was executed in fraud of their rights. HELD—that it was competent, in order to meet this charge of fraud, to show that the motive which induced the husband to direct the deed to be executed to his wife, was to satisfy the claims of one of his creditors.

To support a deed against the claims of creditors, it must not only be founded on a good or valuable consideration, but it must also be *bona fide;* but when founded on a valuable consideration, the party assailing it must show affirmatively that the design was fraudulent.

But a party seeking relief against such a conveyance, need not produce direct evidence of an agreement to defraud the creditors of the grantor; he may prove the fraudulent design by circumstances.

[The bill in this case was filed by the creditors of Roger Tydings, to vacate a deed executed by Thomas R. Beard, and wife, to Mary Ann Tydings, wife of the said Roger, as fraudulent as against them. The deed is dated the 8th of January, 1848, and purports to be for the moneyed consideration of $144.

The bill alleges the indebtedness of said Roger to the complainants, and avers that at the time of their trusting him, he was owner of a certain parcel of land, which he had purchased of said Thomas R. Beard, and on which he had erected a valuable dwelling-house, store-house, and other buildings, with his own labor and money, whereby the property had become greatly enhanced in value, but at that time had not obtained a deed therefor; that complainants trusted him on the faith and credit of said property, of which he was so possessed; that owing to said Beard a small balance of the purchase-money, viz. $144, and being pressed by complainants for payment of their debts, by false and fraudulent representations, and with a view and for the purpose of hindering and delaying them and his other creditors from collecting their just debts, and to cheat and defraud them out of the same, induced the said Thomas R. Beard to convey said property to Mary A. Tydings, his wife, which was accordingly done. That said Roger has no other property out of which complainants could make their debts, or, if any, of very small value.

The answer of Tydings admits his indebtedness to complainants, as charged in the bill, but avers that since the year 1840, he had been indebted to John F. and Benjamin S. Nicholson, in the sum of between $500 and $600; and about the time of the conveyance in question, said Nicholsons being indebted to their mother, Mrs. Elliott, who was also the mother of respondent's wife, in the sum of $500, with interest from the year 1840, proposed to respondent to pay their debt to their mother, in payment of respondent's debt to them. Respondent was unable to do so, and offered instead, to convey said lot to them, in payment thereof; said Nicholsons would not agree to that arrangement, but said that their mother, Mrs. Elliott, would agree to have the money invested in the purchase of the lot for respondent's wife, if respondent would agree to that arrangement, and have the conveyance made. Respondent afterwards saw, and spoke with Mrs. Elliott on the subject, and she agreed to the proposition made by said Nicholsons. It was accordingly made, and the convey-

ance was with the consent of respondent, and with the knowledge of his wife. He has, therefore, ever considered his wife as a purchaser for a full consideration, for he alleges that the said lot and improvements were certainly not worth at that time more than the debt due to Mrs. Elliott, if as much.

He denies all fraud, or fraudulent purpose or intent; avers that he was perfectly willing to have conveyed the lot to the Nicholsons, in payment of his debt to them, and agreed to have it conveyed to his wife, in payment of said Nicholsons' debt to Mrs. Elliott, just as he would have agreed if she had demanded it, to convey the same to her. That he considered himself as paying a just debt to Mrs. Elliott, and on her agreeing to the conveyance to his wife, he did not consider his situation, purpose, or act, in any way altered or changed.

He admits that he did pay to Beard the purchase-money with his own labor and money, and built the improvements thereon in the same manner; and that his wife paid no part of the same, except in the manner above stated; that he has never exercised any control over said property, except with the consent and approbation of his wife, as her mother's money was applied to the purchase thereof. He admits that he has no property, except a very small amount of furniture, worth about $10.

Proof was then taken, the purport of which is sufficiently stated in the opinion of the Chancellor.]

The Chancellor:

The principle of course is not, and cannot be, disputed, that at common law, and independent of our insolvent laws, a debtor may secure one creditor to the exclusion of others, either by payment or a *bona fide* transfer of his property, *Hickley* vs. *The Farmers and Merchants' Bank*, 5 *G. & J.*, 377; *Cole* vs. *Albers and Runge*, 1 *Gill*, 412.

The deed in this case is not assailed upon the ground that it was made, or caused to be made, under an expectation of taking the benefit of the insolvent laws, and with intent thereby to give an undue and improper preference to one creditor to

the prejudice of others; nor could it be assailed on any such ground because *Tydings* the debtor has not in fact applied for release under the insolvent laws, and there is no person in existence who can impeach his acts as in violation of them.

If, therefore, the deed in this case can be successfully attacked, it must be upon the ground, that either at common law or under the provisions of the statute of 13 *Elizabeth, ch.* 5, it is void, as having been made to delay, hinder, and defraud creditors. The allegation of the bill is "that said deed was concocted and executed with the sole view and purpose of cheating and defrauding the complainants of their claims against said *Tydings*, and hindering, delaying, and embarrassing them and his other creditors in the collection of their debts," &c.

Had this deed been a voluntary one, founded merely upon natural love and affection, it could not possibly be allowed to stand in the way of the creditors of the husband, as the agreement filed on the 26th of July last shows that he had no other property from which the claims of his creditors could be satisfied. It would, therefore, upon the most indulgent view of the statute, or of the common law, be fraudulent and void as to creditors, and would unhesitatingly be set aside at their instance.

But the answers take the position, and the evidence maintains it, that this deed rests upon a valuable consideration; that is, that it was caused to be executed by the party having the equitable title in satisfaction of a debt due from him, of an amount equivalent to the value of the property. It is said, however, that this evidence is inadmissible, because the deed purports upon its face to have been executed for the consideration of the sum of one hundred and forty-four dollars paid by the grantee to the grantors; and that it being shown that no such sum was paid by the former, it is not competent to support the deed by proof of the consideration relied upon in the answers. The consideration stated in the deed was, however, paid to the grantor by *Tydings* the husband, and, therefore, being founded upon a moneyed consideration it is good as a deed of bargain and sale.

It is not like the cases of *Hurn* vs. *Soper* and *Betts* vs. *The Union Bank*, relied upon in the argument, in which it was decided that when a deed purports to be made on a moneyed consideration, it cannot be shown that money did not constitute the consideration, because that would be to change the character of the deed from a bargain and sale to a covenant to stand seized to the use of the grantee, a principle which will be found upon examination to have controlled the decision in 2 *Peere Wms.*, 204, referred to by the complainant's counsel. The case is not one of that description. The consideration attempted to be shown here is *ejusdem generis* with that stated in the deed. It is money paid to the use of the party holding the equitable title and at his instance and request, and it is the same thing precisely as if it had been paid to him.

The deed here has not been impeached by showing that the consideration expressed in it was not paid. In point of fact it was paid. But it is urged that it was paid by *Tydings* the husband, and the property conveyed, should, it is insisted, be accessible to the claims of his creditors; and the alleged fraud consists in having the deed executed to his wife, thus putting it out of their reach.

The proof offered, and to which objection is made, is to meet this imputation of fraud. The object is not to change the character of the deed, but to show that the creditors of the husband have no right to complain, because the motive which induced him to direct the deed to be executed to his wife was one which the law allows; that is, to satisfy the claim of one of his creditors.

The principle settled by the Court of Appeals in the case of *Claggett and Hall* vs. *Hall*, 9 *G. & J.*, 80, appears to me to warrant the introduction of this proof for the purpose for which it is offered. It is there said, that when a deed is charged to be fraudulent, and when the consideration stated in it has not been disproved, evidence of collateral circumstances showing an additional consideration not expressed in the deed, may be received to repel the charge of fraud. The observations of the judge who delivered the opinion of the Court, on

page 91, seem to be conclusive upon the question. I should therefore think, even if formal exceptions to the admissibility of this proof had been filed according to the Act of Assembly, it would be admissible.

But it is said, and the rule is clear, that to support a deed against the claims of creditors it must not only be founded on a good or valuable consideration, but it must also be *bona fide.* 1 *Story's Eq., secs.* 353, 369. And it is urged that the deed in this case was made, or procured to be made, with intent to defraud and defeat creditors, and that therefore though a good and adequate consideration may have been paid for it, is void under the statute, and *Twyne's case*, 3 *Coke's Rep.*, 81, and the cases maintaining the same doctrine have been referred to in support of this position.

There is no doubt of the truth of the position, and that a valuable and full consideration will not protect a transaction, if the intent was a fraudulent one. This is clearly shown by the cases cited in sec. 369 in 1 *Story's Eq.*, 363; but when a conveyance or transfer of property rests upon a valuable consideration, it is not open to impeachment unless the party assailing it can show affirmatively that the design was fraudulent. There can be no question to be sure that such design may be exposed by circumstances, and that the party seeking relief against a conveyance need not produce direct evidence of an agreement to defraud the creditors of the grantor. In *Worseley* vs. *De Mattos*, 1 *Burr.*, 474, 475; and in *Twyne's case*, the deeds were declared void because the grantors were allowed to remain in the possession and use of the property as their own, by means whereof they enjoyed a credit to which they were not entitled and were enabled thereby to deceive and defraud others who dealt with them, because of their possession and enjoyment of the property which had been conveyed. But in the case now before this Court, the credit was given to *Tydings* before the date of the conveyance, and therefore there is no ground for charging collusion between the parties, to deceive third persons by holding out *Tydings* to the world as the owner of the property conveyed. Besides this deed,

which was executed on the 8th of January, 1848, was recorded on the same day, thus giving constructive notice to all the world of its contents. It is the case, then, simply of a party indebted to several, and securing one, of his creditors to the exclusion of others, a thing which at common law and apart from the insolvent laws he had a perfect right to do, and which the preferred creditor had an undoubted right to call upon him to do. And as soon as the transfer was made the conveyance was enrolled among the public records of the county that all persons having an interest in knowing might be apprised of the condition of the title.

In addition to all this, there is not a particle of evidence that either *Mrs. Elliott*, whose money paid for the property, or *Mrs. Tydings*, to whom the conveyance was made, knew of the indebtedness of *Roger Tydings*, to the complainants, without which knowledge there can of course be no pretence for imputing to them the design to injure the complainants; though I am very far from being of opinion that such knowledge, even if it existed, would have rendered their conduct in taking the conveyance iniquitous.

The deed, therefore, in my opinion must be permitted to stand; and as the complainants can reach *Roger Tydings'* interest as tenant by the courtesy, by an execution at law (if he is entitled to such interest), this Court should not interfere and, grant relief to that extent. The bill, therefore, will be dismissed.

Henry M. Murray and Frank H. Stockett, for Complainants.

Cornelius McLean, for Defendants.

WILLIAM J. COLE,
vs.
DANIEL O'NEILL ET AL.

July Term, 1851.

[MARITAL RIGHTS OF A HUSBAND.]

Official copies of deeds taken from the records, are *prima facie* evidence of everything necessary to the validity of the instruments.

A voluntary conveyance by a woman in contemplation of marriage, is avoidable by the husband, from whom it was concealed, or who had no notice of it, as in derogation of his marital rights, and a fraud upon his just expectations.

But it is indispensably necessary to the successful impeachment of such a deed, that the husband should be kept in ignorance of it, up to the moment of the marriage, and even if he be so kept in ignorance, it will depend upon circumstances whether it be valid or not; the question in all such cases is whether the evidence is sufficient to raise fraud.

If it appears that the conveyance was made during the treaty and in contemplation of marriage, and it does not appear that it was made known to the intended husband, either expressly or by construction of law, he will be presumed to have been ignorant of it, and the *onus* is upon the party claiming under the deed to show affirmatively that he had notice.

It is the settled American doctrine that the registration of a conveyance operates as constructive notice upon all subsequent purchasers of any estate legal or equitable in the same property, and it is not easy to suggest a good reason why this doctrine should not apply to the intended husband.

Property was settled upon a wife by her first husband for her separate use, free from any control of her husband, with the power of absolute disposition by deed or will. Held—that this settlement was operative as against the marital right of a second husband.

The protection which Chancery gives to the separate estate of a married woman, with its qualifications and restrictions, attaches to it throughout a subsequent coverture, the principle being that a person marrying a woman so circumstanced is considered as adopting it in the state in which he finds it, and bound in equity not to disturb it.

Where a portion of the property in dispute was equitable, and the plaintiff's title could not, therefore, be asserted in a court of law, and the number of tenants great, and endless litigation might and probably would ensue at law, the jurisdiction of equity may be maintained.

In a case where the plaintiff shows equitable title to a part of the property in dispute, and a legal and equitable title to the rest, it being decided that the defendant has no title legal or equitable, and where preservation of the property requires it, a receiver will be appointed.

[On the 4th December, 1850, the complainant filed his bill of complaint in this case, against the defendant O'Neill and others, stating in substance, that by deed dated 17th April, 1843, Catharine Drake conveyed to complainant certain real estate in that deed described, and all other her property in trust for her use during her life, with absolute power in any manner, and free from the control of any future husband, to dispose of said property, and in the event of a failure on her part to exercise said power, then for the use of complainant and his heirs. That by deed dated 27th February, 1843, the said Catharine Drake had mortgaged parcel of the property conveyed in trust as aforesaid, to the complainant to secure payment of the sum of $448 71, with interest due from her to him, which debt remains unpaid. That after the execution and enrolment of said deed of trust, the said Catharine Drake intermarried with the said O'Neill, and afterwards on the 28th August, 1850, departed this life without having made any disposition of said trust property, save only of a parcel which she conveyed to Margaret Ann O'Neill, by deed dated 12th April, 1848. In consequence whereof the complainant became entitled absolutely to the property conveyed to him as aforesaid.

That said real property, or the greater part thereof, including the parcel mortgaged as aforesaid, consists of property described in deeds, of which his exhibits are copies. That at the time of the death of the said Catharine, the said trust property was, and at this time is, in the occupation of tenants paying rents, who have received notice of the complainant's claim with regard to the said premises, and have been required to pay the rents thereof to him. But that the defendant O'Neill pretending to act at times for the next of kin and heirs-at-law of the said Catharine, and at other times in his own right, has interfered with said tenants, so that they refuse to pay their rents to the complainant, and complainant is thereby aggrieved and unable out of said rents to pay ground-rents and taxes chargeable on said property, and to repair the buildings thereon.

The bill is filed against O'Neill, the surviving husband, Henry Lechler and Elizabeth Fleming, as heirs-at-law of the

deceased, Catharine Drake, and certain others, who are charged as tenants coming in under the said Catharine. And it prays that the title of the complainant to said premises may be quieted, and that the rents accruing thereon may be decreed to be paid to him, and for general relief. It prays also for an injunction to prevent the said O'Neill, Lechler, and Fleming, from intermeddling with said rents, and that a receiver may be appointed, to collect and apply the same under direction of the Court.

The deed from Catharine Drake to complainant, professes to convey the grantor's interest in the property, which had been conveyed by William Drake, her former husband, to James Mowatt, by deed dated 3d January, 1825, and by William Krebs to James Mowatt, by deed dated 2d February, 1825, and by Feinour and Drake to complainant, by deed dated 17th December, 1839, and all other the property, estate, and effects of the said Catharine Drake, and the trusts are as stated in the bill.

The deed from William Drake to James Mowatt, conveys three parcels of leasehold to the grantee, in trust, "for the sole and exclusive use and benefit of Catharine Drake, wife of the said William Drake, her executors, administrators, and assigns, free, clear, and discharged of any control of her husband, with full and complete power and authority to her, to convey, transfer, and dispose of the same, by indenture of assignment, under her hand and seal, and by last will and testament."

The deed from Krebs to Mowatt, conveys a lot to Mowatt in fee, in trust "for the sole and exclusive use and benefit of the said Catharine Drake, and her heirs, and with full power to her to sell and convey the same by deed or devise the same by last will."

The deed from Peters to complainant, conveys leasehold in trust "for the sole and exclusive use and benefit of the said Catharine Drake, and that free, clear, and discharged from the claims of any husband, which the said Catharine may here-

after have, and without being liable for his debts, and with power to her to sell and dispose of the same."

The answer of Daniel O'Neill denies all knowledge of the execution of the deed from Catharine Drake to the complainant, and avers that he never heard of it until after her death. It avers that two months prior to the date of the said deed, the said Catharine and defendant became engaged to be married to each other, and that pursuant to the said engagement, on the 14th May, 1843, they were married, and that they lived together as man and wife, thenceforth until the death of the said Catharine, which took place on the 28th August, 1850. It insists that said deed, if executed at all, was so executed in fraud of the marital rights of defendant, and is therefore void, and defendant therefore claims to be entitled to all the leasehold, settled in trust for his said wife as before stated, and to the rents and profits thereof.

The answers of the defendants, Lechler and Fleming, likewise deny all knowledge of the execution of the deed from Catharine Drake to complainant, and insist it was made, if made at all, in fraud of the marital rights of O'Neill, and is therefore void.

An injunction was granted on the filing of the bill. After coming in of the answers, the defendants moved for a dissolution of the injunction, and the complainant moved for the appointment of a receiver. The motions were heard together. The Chancellor passed an order continuing the injunction until final hearing, and on the 28th July, another order was passed, appointing a receiver as prayed. Accompanying the first order, he delivered the following opinion.]

THE CHANCELLOR:

This case has been brought before the Court at this term; and has been argued upon motions to dissolve the injunction which was granted when the bill was filed, and for the appointment of a receiver, which was also asked for in the bill but held over for the coming in of the answer, or until further order.

The defence taken in the answer of O'Neill, the surviving husband of the late Catharine O'Neill (formerly Catharine Drake), and of the defendants Henry Lechler and Elizabeth Fleming her brother and sister and heirs-at-law, that the deed to the complainant of the 17th of April, 1843, was a fraud upon the marital rights of O'Neill, can, if well taken, only avail the surviving husband, it being clear that if a fraud at all, it is a fraud only upon him and to be complained of only by him. And hence it follows, that if the deed is not to prevail as against the heirs-at-law, it must be upon some other ground.

The defendants do not admit the execution of this particular deed, but they do admit that the complainants' exhibits (the deed in question being one of them) are office copies as they purport to be; and it appears to me quite impossible to deny that these copies from the record are at least *prima facie* evidence of everything necessary to the validity of the instrument.

In the answer of O'Neill it is said that the grantor could neither read or write manuscript, and from this statement, which, from the fact that her mark is made to the paper appears to be true, and from the supposed want of motive for its execution, an attempt is made to establish fraud in fact, or some unfair dealing in procuring it. The attempt, however, in my opinion is entirely unsuccessful. Fraud certainly is not to be presumed; and any inference unfavorable to the deed which might be deduced from the circumstance that the grantor could neither read or write, is repelled by the certificate of the magistrates before whom her acknowledgment was made that the contents of the deed were fully explained by them to the grantor at the time.

It seems to me, therefore, quite clear that so far as the heirs-at-law are concerned, the deed in dispute is free from objection.

The case of the surviving husband, who insists that the deed is a fraud upon his marital rights with respect to the leasehold property conveyed by it upon which those rights by the marriage are supposed to have fastened, is thought to be different.

It may perhaps be regarded as an established principle of this Court, that a voluntary conveyance by a woman in contemplation of marriage is avoidable by the husband from whom it was concealed or who had no notice of it, as in derogation of his marital rights and a fraud upon his just expectations; though, as was said by the Lord Chancellor in *St. George* vs. *Wake*, 1 *Mylne & Keene*, 610, the principle rests rather upon a uniform current of *dicta*, than upon adjudged cases. In truth it was affirmed in that case, in which all the previous decisions were reviewed, that the case of *Goddard* vs. *Snow*, 1 *Russ.*, 485, was the only case in which a conveyance by the wife, though without consideration, was set aside simply because made during a treaty of marriage and without the knowledge of the intended husband.

As moreover everything depends upon the fraud supposed to be practiced upon the husband, it is indispensably necessary to the successful impeachment of the settlement that he should be kept in ignorance of it up to the moment of the marriage; and even if he is so kept in ignorance, it will depend upon circumstances whether it be valid or not. 1 *Mylne & Keene*, 610; 2 *Kent's Com.*, 174; *The Countess of Strathmore* vs. *Bowes*, 1 *Ves. Jr.*, 22. In this last case, Lord Thurlow said, "A conveyance by the wife, whatsoever may be the circumstances and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud;" and in that case he refused to set aside the conveyance, though the husband did not know of it. The question, he said, which arises in all these cases is, whether the evidence is sufficient to raise fraud?

There was some discussion in the course of the argument of this case with respect to the party upon whom the *onus* of proof of notice rested. It being contended on the one side, that the husband must show that he had no notice; and on the other, that the party claiming under deed must show affirmatively that he had notice. It appears to me that it would be unreasonable, and contrary to analogies, to require this negative proof of the husband. Indeed, I do not well see

how he could furnish the evidence, and, therefore, I think that if it appears that the conveyance was made during the treaty and in contemplation of marriage—and it does not appear that it was made known to the intended husband, either expressly or by construction of law—that he will be assumed to have been ignorant of it, and that all the consequences of such ignorance will attach to the transaction.

The deed in this case was executed and acknowledged on the 17th of April, 1843, and recorded on the 19th—two days thereafter; and the marriage took place on the 14th of May following. Now the promptness with which it was put upon the public record certainly does not indicate a desire to keep it a secret from the husband or from any one else, and I think it may be well doubted whether the registration of the conveyance shall not be regarded as constructive notice to the husband. It is as Mr. Justice Story says, the settled American doctrine, "That the registration of a conveyance operates as constructive notice upon all subsequent purchasers of any estate, legal or equitable in the same property." 1 *Story's Eq.*, *sec.* 403. And if subsequent purchasers are by such registration affected with notice upon the ground that it is their duty to search for prior incumbrances, the means of which search are within their power, it is not easy to suggest a good reason why the intended husband, if he wishes to inform himself of the situation of the property of his intended wife and see that nothing has been done to interfere with his marital rights, should not be required to be equally vigilant. The equity of the husband is certainly not stronger than the equity of a *bona fide* purchaser without actual notice; and if the latter is affected with constructive notice by the registration of the deed, it would seem the former should be also.

But without meaning to decide at this time that a husband will not be allowed to assert his marital rights with respect to property conveyed away by his intended wife in contemplation of marriage and without notice to him, except such notice as is inferred from the fact of registration, another view may

be taken of this deed, which seems to me to relieve it from any well-founded objection.

If with reference to the property contained in this deed, the marital right of the husband did not attach, and would not have attached even if it had not been executed, it follows necessarily that it can be no fraud upon that right.

A portion of the property conveyed by the deed of the 17th of April, 1843, to the complainant, had been conveyed by deed bearing date the 3d of January, 1825, by William Drake, the first husband of Catharine O'Neill, to one James Mowatt, in trust "for the sole and exclusive use and benefit of the said Catharine, wife of the said William Drake, her executors, administrators, and assigns, for ever, free, clear, and discharged from any control of her husband, and with full and complete power and authority to the said Catharine to convey, &c., the same by indenture and assignment under her hand and seal, or by her last will and testament."

It is absolutely certain, and has not been disputed, that by this settlement of William Drake for the use of his then wife, his own marital rights were extinguished, and that, with reference to the property thereby conveyed, she was to be regarded as a *feme sole*. But it is said that though the deed operated to suspend or destroy the rights of Drake, her then husband, it becomes inoperative after his death, and can have no influence upon the marital rights of a subsequent husband. If this shall turn out to be the legal effect of this deed, there is assuredly strong grounds for believing that it is an effect not within the contemplation of the party who made it, for can it with any degree of plausibility be contended, that William Drake, the maker of that deed, meant to settle property on his wife, free from his control, and yet subject it to the control and disposition of any person she might marry after his death?

Two cases are cited in support of the proposition, that the trust for the separate use of the wife was confined to the first marriage. They are reported in 6 *Simons*, 121 and 126; the first, the case of *Knight* vs. *Knight*, the other that of *Benson* vs. *Benson*, and it will be found, upon an examination of them,

that the Vice-Chancellor, by whom they were decided, rested his judgment upon the ground of intention, as shown by the terms of the deed, and not upon any general principle which can fairly apply to this case. In the case of *Knight* vs. *Knight*, the settlement, after creating a trust for the sole and separate use of the intended wife, notwithstanding her coverture, proceeds to declare that "the said income, interest, dividends, and annual produce, shall not be subject to the power, control, debts, intermeddling, or engagements of the said Robert Giveen, her intended husband," and this clause, the Vice-Chancellor said, manifestly alluded to the then intended coverture, the *name* of the person whom she was about to marry being given, and against whose interference with the property embraced in the settlement the instrument provided.

In the case of *Benson* vs. *Benson*, the trust was created by the will of the father, for the sole and separate use of his daughter, then a married woman, and the words used were, "for the sole, separate, and exclusive use and benefit of my daughter, Jane Abel Lane, the wife of John Branford Lane, Esquire, for, and during her natural life," and "free and independent of the debts, control, or engagements of her husband." Lane, the then husband, died, and his widow married again; and it was decided by the Vice-Chancellor, that the trust for the separate use of the wife, ceased upon the death of her first husband, being of opinion "that according to the plain sense of the words of the will, her husband, J. B. Lane, and no other was meant."

In both these cases it will be seen, that the husbands against whose control of the trust property, provision was made, are named specially, and there is nothing to show that any future husband was within the contemplation of the parties.

They differ from the case now under consideration, in this very material fact, that the settler here was himself the then husband of the lady, and whilst guarding the property against himself, it is highly improbable he intended to expose it to the control of any future husband she might have.

This case, and the cases relied upon, differ also in another

very essential feature. In them, the wife was merely entitled to the profits of the estate for life, having no *jus disponendi* over the property, from whence the profits proceeded, except that in the case of *Knight vs. Knight*, the settlement, in a certain contingency, reserved to the lady the power of disposing of the property by will, which by her then intended husband she was authorized to make.

But in this case, the deed of William Drake not only settles the property for the sole and separate use of his wife, but gives her the absolute and uncontrolled power of disposing of it by deed, or by her last will and testament; and we must therefore not only assume that Drake meant the trust should terminate with his life, and that every future husband might take the rents and profits to his own use, but that he also meant, in case she should survive him and marry again, that her *jus disponendi* should be taken from her, and the property being leasehold, that her second husband might also dispose of that. It is, as before said, extremely difficult to believe that Drake intended that such consequences should result from his deed.

But the authority of the cases of *Knight* and *Knight*, and *Benson* and *Benson*, is greatly shaken, if not overthrown by the subsequent cases of *Tullett* vs. *Armstrong*, and *Newlands* vs. *Paynter*, 4 *Mylne & Craig*, 405, and 417, 418, in which it was held by the Lord Chancellor, after (as he says) the most anxious consideration, that the protection which chancery gives to the separate estate of a married woman, with its qualifications and restrictions, extends and attaches to it throughout a subsequent coverture. The principle being, that a person marrying a woman with property so circumstanced, is considered as adopting it in the state in which he finds it, and bound in equity not to disturb it.

In addition to the property included in and conveyed by the deed from Drake to Mowatt, a further parcel of leasehold was conveyed by Christian G. Peters to William J. Cole, by deed dated the 27th of March, 1843, in trust for the sole and exclusive use of Catharine Drake, then a widow, free, clear, and dis-

charged from the claim of any husband she might thereafter have, and without being bound for the payment of his debts, &c., with power to her to receive the rents and profits, without being bound or liable as aforesaid; and in further trust, to permit and suffer her to dispose of the property absolutely at any time she may see fit to do so, which power is expressly reserved to her, as is also the power to devise the same by last will and testament; and upon the further trust that in the event of no such disposition by her in either way, Cole, the trustee, his executors, &c., should hold the property in trust for the heirs of the said Catharine Drake, who would have been entitled to receive the same, had these presents been executed to the said Catharine Drake, her executors, &c.

As this deed expressly protects the property against any husband Mrs. Drake might thereafter have, it is not denied that it applies to the defendant, O'Neill, and that during her coverture with him, the property was subject to the trusts of the deed. This being so, as it unquestionably is, how is it possible to say that the deed from Catharine Drake to Cole, of the 17th of April, 1843, is a fraud upon the marital rights of O'Neill?

By the deed from Peters to her, of March, 1843, the property was settled to her separate use, with the absolute power of disposition by deed or will, and as O'Neill married her with the property so circumstanced, he is to be regarded as adopting it in that state, and bound in equity not to disturb it.

She could then clearly, even during her coverture with O'Neill, have disposed of the trust property, either by deed or will, without his concurrence or knowledge; and surely, if she could do so after the marriage, there can be no principle which would restrain her from executing a similar power prior to the marriage.

How can O'Neill, the husband, say that he had a right to be consulted, or to interpose any objection to the deed to Cole, executed prior to the marriage, when after the marriage, his wife might have disposed of the property entirely irrespective of his consent?

My opinion, therefore, is, that this deed of Catharine Drake to William J. Cole, of the 17th of April, 1843, is a valid deed, both as against the defendant O'Neill, and the heirs-at-law of his wife.

But it is said, that here is a contest about the legal title to certain parcels of property, and that the parties should be referred to the courts of law for its adjudication, and especially that the Court will not, under the circumstances, put in a receiver.

The controversy, however, is not certainly with respect to a portion of the property about the legal title. The title of Catharine Drake to the property conveyed by the deed from William Drake to Mowatt, was an equitable one only, and by her deed to Cole, of the 17th of April, 1843, she conveyed to him, and could convey to him only, that title. Therefore, so far as that property is concerned, Cole, the plaintiff, is but an assignee of the use, and could not assert his title in a court of law. And in view of the great number of tenants, and the endless litigation which might and would probably ensue, if this Court should refuse to take cognizance of the case, the jurisdiction may, in my judgment, be maintained. The injunction, therefore, must be continued, and hence it is indispensably necessary some one should be authorized to receive the rents and profits, as otherwise they would most likely be lost.

The defendants, in their answer, say, they admit they have been in possession of the property by their tenants since the death of Mrs. O'Neill, but the bill does not so allege, and the answers are not evidence of it. This is not a case, therefore, where a receiver is put upon property against the legal title. But it is a case in which the plaintiff shows an equitable title to part of the property, and a legal and equitable title to another part, in which the defendant, upon the case as it now stands, makes out no title, legal or equitable, and in which the preservation of the property requires that it should be taken under the control of the Court. An order, therefore, will be passed, continuing the injunction, and a receiver will be appointed, when a suitable person is named.

The complainant's counsel may prepare an order for the receiver.

CHARLES F. MAYER, for Complainant.
T. P. SCOTT, for Defendants.

[The decree, in this case, was affirmed upon appeal, by the Court of Appeals.]

WILLIAM M'KIM AND WILLIAM KENNEDY
vs.
WILLIAM MASON ET AL.

DECEMBER TERM, 1852.

[FIXTURES—MECHANICS' LIEN LAWS.]

A MORTGAGE was executed to a manufacturing company, and the affidavit required by the 1st section of the Act of 1847, ch. 271, was made by the agent and treasurer of the Company. HELD—that this was a sufficient compliance with the provisions of that Act.

Where property on which machinery is constructed is subject to a lien or incumbrance prior to the commencement of the building in which the machinery is placed, the lien of the mechanic must be subordinate to the prior incumbrance.

Where a mechanic filed his claim against certain parties, and the *scire facias* was issued against them only, and the notice provided for by the 17th section of the Act of 1838, ch. 205, was not given, but waived by consent, the judgments recovered by the mechanic cannot affect the rights or interests of third persons having liens on the property against which the claim was filed.

Where a mortgage contains no covenant that the mortgagor shall continue possessed of the land, with power to take the rents, profits, and issues, until default made, he cannot be regarded as the tenant of the mortgagee.

A steam-engine and boiler placed in and affixed to a cotton factory, and constituting a part of the motive power thereof, are fixtures, and, as between mortgagor and mortgagee, belong to the latter, though placed in the building after the execution of the mortgage.

Where a mortgage contains no express stipulation, one way or the other,

upon the subject, actual fixtures, of course, pass under it, and as to improvements *doubtful* in their nature, the inquiry is, whether they have become part of the realty? If they have, they must be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment, and they pass by the mortgage.

A mortgage was executed of the real estate of a manufacturing company, consisting of land and the buildings thereon, without any express stipulation as to fixtures. HELD—that machinery subsequently placed in the buildings, so as to become fixtures, passed by it, and enured to the benefit of the mortgagee.

Machinery in a cotton mill, used for the purpose of manufacturing cotton, such as looms, cards, spinning-frames, speeders, &c., and fastened to the building so as to secure their uniform and steady operation, are not fixtures.

As between mortgagor and mortgagee, if the annexation be such as to make it impossible to disunite the personal from the real estate without injury to both, and especially without injury to the latter, the personal will be regarded as real estate, though not affixed *perpetui usus causâ*.

As between such parties, the question is whether the thing so claimed to be a fixture is so attached as to become parcel of the freehold; and this is a question of fact depending on the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them.

The ancient rigor of the rule in regard to fixtures has been mitigated in modern times, and the tendency and spirit of recent decisions is to a still greater relaxation, not only as between landlord and tenant, but also as to parties between whom it has hitherto been applied with more strictness.

Where the holders of the liens on machinery and fixtures, and on the building, are different parties, and rent has been received for the use of the whole property, by the trustees before the sale under the decree, in apportioning such rent, there should be given to the holders of the lien on the machinery such proportion as according to proof they would be entitled to in view of the greater wear and tear of the machinery.

Where a mortgagee purchased the mortgaged premises at the trustees' sale, and took the property wholly discharged from the lien of the mechanic, a purchaser, whoever he may be, from such mortgagee, must take a title equally exempt from the lien.

The lien of the mechanic under the Act of 1838, ch. 205, and its supplements, for work and labor and materials furnished, is in subordination to prior incumbrances, but subject to such incumbrances, the mechanic has a lien on the building and the ground covered by it.

By the 4th section of the Act of 1845, ch. 176, machines are rendered subject to the lien "*in like manner*" as buildings are made subject thereto by the original Act, and hence the lien of the machinist must be subordinate to prior incumbrances.

Proceedings under the lien laws, though in the nature of proceedings *in rem*, are not purely of that character, and unless the notice by advertisement

required by the 17th section of the Act of 1838, ch. 205, be given, the judgment must be limited in its operation to the parties warned by the preceding section.

But if the proceedings are strictly *in rem*, notice, either actual or constructive, is essential to the validity of the judgment against all the world.

Constructive notice is as essential to the validity of a judgment *in rem*, as actual notice is to that of a judgment *in personam;* a proceeding professing to determine the right of property without notice actual or constructive, is a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.

Where a judgment is obtained under the mechanics' lien laws, without notice given as provided by the 17th section of the Act of 1835, ch. 205, a mortgagee of the property, who has no notice, either actual or constructive, would not have the right to appeal from such judgment.

None but parties to the judgment or decree appealed from, have the right of appeal, and the execution of such judgment or decree cannot be stayed or delayed unless the party *against whom* it was rendered or passed gives bond.

[The principal question arising in this case was, whether certain machinery furnished by various parties and put up in a cotton mill, was or was not to be regarded as fixtures. The machinery furnished by the Messrs. Denmead, referred to in the opinion, consisted of a steam-engine of 75-horse power, with the boilers, tanks, and appurtenances, and constituted a part of the motive power of the machinery of the mill, the other part being water power. The three boilers were put up with brick, resting on foundations dug in the earth, in a house built for that purpose exclusively, and to remove them it would be necessary to take down all but its side walls and roof. The engine was set on a very solid permanent foundation, and to keep it and the fly-wheel secured, a hole was bored down through the rock, and the pinion block was cemented with lead, and bolted to a large stone in the foundation. The engine rested on two long sills of wood, to which it was fastened with bolts. These sills rested on a stone foundation, to which they were bolted. The iron segments were fastened to the water-wheel by bolts running through the wheel. The water-wheel was connected to its shaft: at each end of the shaft is a gudgeon fastened into the shaft and resting in a

cast iron box secured to the head-blocks, and the head-blocks rest on a stone foundation, resting on the earth. The steam-pipe passed through each room of the mill, and was fastened by bolts running through each girder, and having a hook at the end on which the pipe rested, but is not fastened to them. The tanks were set on the floor of the first and second stories. The other appurtenances were a set of elevator irons, eighty-four wrought iron shafts, with cast iron pulleys, hangers, couplings, &c. The elevator irons were set into a groove cut into the ends of the joists, and this was all the fastening they had. The wrought iron shafts rest in hangers bolted to the building and secured in the flanges by caps screwed to the hangers. The pulleys were fastened to shaftings which are attached to the cards. The Messrs. Denmead also furnished certain large duck looms, which were fastened to the floors of the mill by screws.

The machinery furnished and claimed by the Savage Manufacturing Company, consisted of the machinery used in the various rooms of the mill, such as speeders, cards, looms, twisters, spinning-frames, willow, mule-beamer, spreader, balling machine, spoolers, &c. The willow was on the second floor, bolted through the floor, and the ceiling of the first floor. The cards were on the second floor and fastened by screws $2\frac{1}{2}$ inches long, which went through the first floor into the second floor, consisting of joists. The fastening of the other machinery was in a similar manner. It was so fastened to keep it in its place and prevent it from moving about. Various witnesses testified that this machinery could be removed with care, without injury to itself or serious injury to the building in which it was placed. It was further proved that such machinery was regarded as personal property, was insured separate from the building, and was frequently owned by different parties. The business carried on in the factory was the manufacture of cotton duck. The other facts of the case are all sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This case, which comes before the Court, upon exceptions to the report of the Auditor, presents several questions of interest, one of which, at least, is admitted on all hands to be involved in much perplexity and doubt. That no clear and well-defined rule can be extracted from the adjudged cases, in reference to the law of fixtures, must be conceded; and it is by no means my purpose to attempt to perform a task, which certainly has not hitherto been performed in a manner which has met with general approval.

The counsel, by whom the rival claimants in this case are represented, have certainly displayed great research in collecting the authorities upon the subject, and they have been explained and commented on, in the argument, with unusual discrimination and ability.

The proceedings show that the Powhatan Manufacturing Company, being indebted to the Bank of Baltimore in a large sum of money; for the purpose of securing the payment thereof, executed to the Bank, on the 24th of March, 1841, a mortgage of certain lands, tenements, hereditaments, and leasehold estates, situate, and lying in Baltimore County, "together with all the buildings and improvements on said land, including the mill, factory, dwelling, and other houses thereon erected, made or being," &c., "and all the machinery and fixtures in said mill, or factory being," &c. The condition was, that the mortgagor should pay the debt as required by the mortgage, and in case of default, then it was declared to be lawful for the mortgagee to procure, by the decree of any court of competent jurisdiction, a sale to be made of the mortgaged property, for the payment of the mortgage debts and costs.

Prior to the date of this mortgage, to wit, on the 5th of February, 1828, there had been conveyed to the mortgagor ten acres of land, or thereabouts, which land was not embraced in the deed to the Bank. The Bank's claim, as stated by the Auditor, and marked claim No. 1, amounted, on the 9th of July, 1851, the date of the trustee's sale, to the sum of $27,535 59, whilst the dividend allowed upon it, in the accom-

panying account, A, is $24,427 27, being a deficiency of something upwards of $3,000.

On the 15th of November, 1845, the Powhatan Company, by its deed of that date, conveyed the mortgaged premises and the ten acres to William Mason, and on the same day Mason executed a mortgage to James Wilson, of all the property embraced in the mortgage of the Powhatan Company to the Bank, together with the ten acres which were not included therein.

Subsequently, in the years 1847 and 1848, Mason erected a new cotton mill on the premises, for manufacture of cotton duck, and in this mill there was put machinery, manufactured by the Savage Manufacturing Company, and other parties.

The record shows that on the 13th of August, 1846, an agreement was entered into between Mason and the Savage Manufacturing Company, by which the latter stipulated for the building of cotton machinery, at certain prices for the former, it being a part of the agreement, that the machinery itself, when built, should be pledged for the payment of the notes given therefor. Mason, the elder, having afterwards formed a partnership with William Mason, Junior, and Henry A. Barling, under the name and style of William Mason and Sons, these three parties, by their deed dated the 22d of February, 1848, conveyed by way of mortgage, certain pieces of said machinery, which are enumerated and described in the instrument to the Savage Company, to secure the payment of the money. An objection has been taken to this mortgage, upon the ground that the affidavit required by the 1st section of the Act of 1846, ch. 271, was not made by the mortgagee.

The affidavit was, in fact, made by George Williams, agent and treasurer of the Company, and this, I think, is quite sufficient to rescue it from the objection, under the provisions of the 2d section of the supplement to the original Act, passed at December Sessions, 1847, ch. 305. The objection, though thrown out in the argument, was not much insisted on.

In the Auditor's statement of claims, those of the Savage Manufacturing Company, which have been assigned to other

parties, are numbered 6 and 7. Adam and William Denmead, whose claims are numbered 8 and 9, supplied portions of the machinery. This consisted, with the exception of some looms, of the motive power. According to the proof, there was a steam-engine, with three boilers, tanks, and appurtenances, which were put up and placed upon the premises in the mode pointed out by the witnesses, Barling & Hedrick. The Messrs. Denmead claim to have a lien on this machinery under the mechanics' lien law, and upon the footing of judgments recovered upon a proceeding in Baltimore County Court, in September, 1849, under the lien law passed at December Sessions, 1838, ch. 205. It is insisted on their part, that these judgments are in the nature of proceedings *in rem*, and binding and conclusive on all the world.

So far as the rights of these creditors depends upon the cases relating to the lien of mechanics and others upon buildings, the decision of this Court in the case of *Jones* vs. *Hancock*, 1 *Maryland Ch. Decisions*, 187, is conclusive against them, as respects prior incumbrances. The property upon which the machinery in question was constructed, was subject to a lien or incumbrance prior to the commencement of the building in which the machinery was placed, and consequently so long as the case of *Jones* vs. *Hancock* remains unreversed, the lien given to the mechanic must be deferred to the prior incumbrancer.

I have not deemed it necessary to look into the authorities, to see how far the proceedings authorized by the act of 1838 can give to the judgment which may be rendered for the claim, the quality of a judgment *in rem*, because the records of these judgments show that these creditors not only have not adopted the proceedings by which the rights of third parties could be affected, but they, by agreement with the defendant's counsel, have expressly waived it.

The claim of the Messrs. Denmead was filed against William Mason, William Mason, Jr., and Henry A. Barling, and the *scire facias* authorized by the 14th section of the statute, was issued against them only. But the legislature contemplated

that other parties might be interested, and care was taken that notice should be given to such other parties, that they might come in and protect their rights; and hence the 17th section provides that the sheriff to whom the writ of *scire facias* may be directed, shall give notice thereof to all other claimants and persons interested, by advertisement in two daily newspapers published in the city of Baltimore, and at least ten days before the return day of the writ. The records of the judgments recovered by these parties, show that the notice directed by the law was not given by the sheriff. On the contrary, the sheriff returned that the "advertising was waived by consent of plaintiff's and defendant's attorneys." Under such circumstances, to give the judgments the effect claimed for them by the counsel of Messrs. Denmead, would seem to be impossible.

I am, therefore, of opinion, that the question between them and the mortgagees must depend upon the answer which may be given to the principal question in the cause, and that is, whether the machinery which they supplied is a fixture or not?

Poole and Ferguson, whose claim is marked No. 10, rest their right exclusively upon the lien law. It appears from the proceedings, that they made certain repairs to the machinery in the Powhatan Factory and supplied and put up in the new factory certain cast iron pipes, for which they claim a lien, as "machinists and iron-founders, for work and materials, to wit: iron-castings, wrought iron in bands, and pipes, and bolts, and lumber." The right of these parties to be paid out of the proceeds of the sales in this case depends likewise upon whether the machinery repaired and made by them is to be regarded as part of the freehold, or retains its character of personal estate. If in legal contemplation they are fixtures they are operated upon by the mortgages, and enure to the benefit of the mortgagees.

The claim of Thomas P. Williams, and Spence and Reid, No. 11, is founded on a mortgage executed to them by William Mason and wife, and William Mason and Son, bearing date the

2d of April, 1849. The object of this deed was to secure advances to be made by the mortgagees from time to time to the firm of Mason and Son, not exceeding at any one time thirty thousand dollars, and it embraces the entire property, real and personal, sold under the decree in the cause, and by its terms is subject to prior incumbrances.

Ineffectual attempts having been made by the trustees appointed by the decree of this Court to make sale of the property as an entirety, an order was passed authorizing a sale in separate parcels, which was accomplished, the parties respectively furnishing the machinery becoming purchasers thereof. These sales have been ratified, but in the order of ratification all questions affecting the distribution of the proceeds were reserved, so that the rights of the several parties to the proceeds are now for the first time presented for consideration.

It has been urged, that the relaxation of the rule in regard to fixtures and the indulgence which has been shown by the Courts in its application, when the question arose as between landlord and tenant, and especially when it affected fixtures erected for the purposes of trade, should prevail in this case, upon the ground that the elder Mason, the mortgagor, and his partners might and should be treated as the tenants of the mortgagee upon the authority of the case of the *George's Creek Coal and Iron Company* vs. *Detmold*, 1 *Maryland Rep.*, 225. But this case in my opinion by no means supports the proposition for which it is cited. In that case there was an affirmative covenant, that the mortgagor should continue possessed of the land, with the power to take the profits and issues, until default, and this covenant in the judgment of the Court amounted to a re-demise, there being a certain determinate time fixed, beyond which the right of possession should not continue. But in this case no such covenant is to be found, and hence, according to the express language of the Court of Appeals, in laying down the rule which they say is to be extracted from the cases, the ground upon which the re-demise will be inferred does not exist. Their language is, "that no such re-demise will be inferred from a covenant that

the mortgagee should not sell or lease (even if construed a covenant not to enter) until after notice, since both the certainty as to the time, and the affirmative words of the right of enjoyment are wanting, which are essential to create a term for years."

I apprehend, therefore, that the rule as to fixtures, which applies as between mortgagor and mortgagee, must govern in this case. There can be no doubt, I think, that the ancient rigor of the rule has been somewhat mitigated in modern times, and that the tendency and spirit of recent decisions, both in this country and in England, is to a still greater relaxation. It is most manifest, that the Supreme Court of the United States, in the case of *Van Ness* vs. *Pacard*, 2 *Peters*, 137, was by no means disposed to recognise the distinction drawn by Lord Ellenborough, in *Elwes* vs. *Maw*, 3 *East*, 83, between annexations to the freehold for the purposes of trade or manufacture, and those made for the purposes of agriculture, and I strongly incline to think, that whenever the question is directly presented to that Court for adjudication the distinction will be disregarded. That it was not viewed with favor by Mr. Chancellor Kent may be fairly inferred from the remarks made by him on pages 346 and 347 of the 2d volume of his Commentaries. Whilst, however, I think there exists a disposition to soften the rule, not only as between landlord and tenant, but as between parties standing towards each other in relations in which it has hitherto been applied with more strictness, I certainly do not feel myself at liberty to apply it with a moderation not sustained by the adjudicated cases.

If the law upon the subject is still too stringent to comport with the policy of the country and the spirit of the age, it is far better it should be modified by the legislature, as was done in New York, as between heir and executor or administrator, 2 *Revised Statutes*, 24, *sec.* 6, than that the Courts should undertake it, influenced by what they may believe to be required by the exigencies of the times in which we live.

Entertaining these views, I shall proceed as briefly as possible to dispose of the remaining questions in the cause.

The machinery, the proceeds of the sale of which give rise to the present controversy, consists in part of the steam-engine and boilers, constituting the motive power of the factory, and the machinery by which the cotton was manufactured, and which is described in the mortgage given to the Savage Manufacturing Company.

So far as that portion of the machinery is concerned which supplied the motive power and which was affixed to and placed in the building, in the manner described by the witnesses, it seems upon authority to be too clear for dispute, that it must be regarded as a part of the freehold, and as falling within the operation of the mortgages to the Bank and Wilson.

The counsel for the Messrs. Denmead pressed upon the Court the circumstance that this machinery was placed in the building after the execution of the mortgages, but so far as I am informed by the authorities this makes no difference. *Winslow* vs. *The Merchants' Ins. Co.*, 4 *Metcalf*, 306, is a direct decision upon the point, and I have been furnished with no case to the contrary, though numerous cases establishing the same principle have been produced and could be cited if necessary.

The authorities which prove that machinery of this description, affixed to a building for manufacturing purposes, becomes a part of the freehold, and as between mortgagor and mortgagee belongs to the latter as part of his security, are numerous and conclusive. The case cited is a strong one upon the question, and there are none so far as I am aware at variance with it, and it is fully supported by the cases of *Powell* vs. *The Mouson and Brimfield Manf. Co.*, 3 *Mason*, 459; *Farrar* vs. *Stackpole*, 6 *Greenlf.*, 154, and *Voorhis* vs. *Freeman*, 2 *Watts and Serg.*, 116.

It has been contended, however, that as by the terms of the mortgage to the Bank the machinery in the mill or factory then in existence passed, and as the Powhatan factory and the machinery in it was subsequently erected and put up, the latter ought not to be included in the mortgage, as not being within the contemplation of the parties at the time of its execution. The argument is, that the parties by their con-

tract have made a law for themselves, and that is, that the machinery and fixtures in the Powhatan factory shall constitute a portion of the security of the mortgage, but that machinery, though from its nature and the mode of its annexation a fixture, and as such a part of the realty, does not pass by the mortgage where it appears to have been made and affixed subsequently to its execution.

The mortgage in this case certainly contains no stipulation that improvements or additions to the premises, which are in their nature fixtures shall not pass and be bound as a part of the realty, and therefore the question is, what will be a reasonable and legal construction of its provisions? If the security of the mortgagee is limited to the extent to which the argument would conduct us, it might, perhaps, be insisted, that the new mill itself constituted no part of the security, but this, of course, has not been pretended. In the absence, then, of an express stipulation, one way or the other, the inquiry is as to the nature of the improvement. Has it become a part of the realty or not? If it has, it is to be considered as done by way of permanent improvement for the general benefit of the estate, and not for its temporary enjoyment, *Hunt* vs. *Hunt*, 14 *Pick.*, 386. This is the rule, says Chief Justice Shaw, in 4 *Metcalf*, 312, "in regard to articles *doubtful* in their nature," but as to additions which are not in their nature equivocal, the deed must of course include them. "If," say the Court, "such improvements consist in actual fixtures not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee by increasing the value of the pledge. The expectation of such improvement and such increased value often enters into the consideration of parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced." And it may, I think, be very reasonably supposed, that the mortgagees in this case had an eye to such improvements and increased value of the identical nature and character which have been made upon the property mortgaged. The amount stated to be due from the mortgagor at the date of the mortgage was fifty-one

thousand dollars, and it provides not only for a continuance of this debt, but that it may be augmented to eighty thousand dollars. In view of this stipulation, and looking to the fact that the mortgagor was a manufacturing company, it may, I think, be fairly inferred, that it was in the contemplation of the parties to add to the value of the pledge by improvements in buildings and such machinery as might from time to time be required to carry on the business. So far as such improvements become, *de facto*, part of the realty, and are not in their nature equivocal, the law upon the subject seems to be free from doubt. They are to be regarded as included in the deed, and go, of course, to the benefit and security of the mortgagee by increasing the value of the pledge.

But it is again urged by the counsel for the Denmeads, that they do not claim under the mortgagors, but in opposition to them. That the mortgagors did not own this machinery, but took it subject to their claim, and, therefore, it is supposed this case is distinguishable from the numerous cases which have been cited by the counsel for the Bank.

If, however, I am right in thinking that this particular machinery became a part of the realty, by being placed upon and affixed to it, it became subject to the mortgage, and bound for the debt secured by it, to the same extent in all respects as the building which contained it, and the mortgage being the prior incumbrance the lien of the mechanic must be in subordination to it.

It is, therefore, my opinion, that with respect to that portion of the proceeds of these sales which arose from the motive power furnished by the Messrs. Denmead, they must be postponed to the claims of the mortgagees, the machinery constituting the power being regarded by me as affixed to and a part of the realty.

But upon a very careful examination of the evidence and the authorities relating to the subject, I do not think the machinery furnished by the Savage Manufacturing Company has lost its character of personalty by the mode in which it has been put into the building.

It is undoubtedly true, that according to the reasoning of some of the cases, a portion of this machinery might be regarded as fixtures, and consequently as becoming part of the realty, but no case has been produced, and it is thought none can be found, in which machinery used for carrying on the kind of manufacture which was carried on in this mill, has been *adjudged* to be real estate, although in several of them the mode of putting it up and securing its uniform and steady operation, has been in every essential particular precisely like the present.

In the case of *Walker* vs. *Sherman*, 20 *Wendell*, 636, the question arose upon the report of commissioners in partition between tenants in common, and it was decided that machinery used in a woollen factory, which had passed with the estate from one owner to another for a series of years, was no part of the realty. The case was decided after an examination of many of the English and American authorities. It was treated on the same principle as if it had arisen between grantor and grantee, when the doctrine of fixtures making a part of the freehold and passing with it, is applied much more extensively than between some others.

There can be no doubt that the Judge by whom the opinion in *Walker* vs. *Sherman* was pronounced, was disposed rather to relax the principle to be gathered from some of the preceding cases, than to render it more stringent. He was evidently indisposed to carry the principle of constructive fixtures as far as it had gone in the cases he was commenting on, and although it may be inferred from some expressions to be found in his opinion, that mere physical annexation, though slight, and causing by the separation but little injury to the freehold, would give to the thing so annexed the character of a fixture, I am persuaded that, looking to the whole opinion, he did not so intend to be understood. On page 639, he complains of the severity of the law, and says, that to constitute a fixture, the machinery "must not only be essential to the business of the erection, but it must be attached to it in some way; at least it must be mechanically fitted, so as in ordinary

understanding to make a part of *the building itself.*" I am strongly inclined to think that, whatever stress may be laid upon some of the expressions contained in this very elaborate opinion of Judge Cowen, the principle which runs through it, and fairly to be deduced from it, is against regarding such machinery as that made by the Savage Manufacturing Company, and put up and secured as described by the witnesses, as forming a part of the building itself.

The case of *Vanderpool* vs. *Van Allen*, 10 *Barbour*, 157, cannot easily be distinguished in principle from the cases now under consideration. The property claimed to be fixtures, and as such to have become a part of the real estate mortgaged for the benefit of the mortgagee, consisted of the same description of machinery, and was attached to the building very much as in this case, yet it was held that it did not come within the denomination of fixtures, nor lose its character of personal estate, and this conclusion was stated by the Judge who delivered the opinion, to be quite consistent with the case of *Walker* vs. *Sherman*.

The opinion of Mr. Justice Brown, in 10 *Barbour*, 163, 164, contains several passages strikingly applicable to the present case, and, as I think, exhibits with great propriety and clearness the distinction between that kind of machinery which, from its weight and adaptation to the place where it is fitted and used, must be regarded as a part of the realty to which it is attached, and those lighter and more portable articles, which are capable of removal and use elsewhere, without injury to themselves or the building in which they stand.

In this case of *Vanderpool* vs. *Van Allen*, the authorities, or many of them, are again brought into review, and I am persuaded it will be found, upon an examination of them, that the old and rigid rule, that any annexation whatever to the freehold, however slight, will make the thing annexed a part of it, is not the law of the present day, and in view of the circumstances of the age in which we live, and the importance of encouraging and protecting the rights of him who employs his time and tasks his ingenuity in inventing new methods for

facilitating the operations of human labor, I may, perhaps be permitted to express my satisfaction that it is not.

In the case of *Holmes* vs. *Tremper*, 20 *Johns.*, 29, in which it was decided that a tenant might remove a cider-mill and press erected by her for her own use, Chief Justice Spencer, in pronouncing the judgment of the Court, said, "the rule anciently was very rigid, but I think it has yielded materially to the more just and liberal notions of modern times," and this case is referred to by Chancellor Kent, as containing a just and enlarged view of the subject. 2 *Kent's Com.*, 347.

It has already been said that no case has been produced by counsel, or found in my own researches, in which machinery placed in a mill for the manufacture of cotton, has been held to pass with the freehold as a part of it, as between vendor and vendee and mortgagor and mortgagee, whilst the cases establishing the contrary are numerous. In *Swift* vs. *Thompson*, 9 *Conn.*, 63, machinery in a cotton mill, attached to the building so far as to keep the machinery steady, and which could be removed without injury to the building or the machinery, was held to be personal property, as respects creditors and purchasers; and *Gale* vs. *Ward*, 14 *Mass. Rep.*, 352, maintains the same doctrine.

Some of the cases say that to convert things of a personal nature into real estate by annexation to the freehold, they must be fixed to it *perpetui usus causâ*, a phrase borrowed from the civil law. But this, as I understand it, is the rule when the question arises between landlord and tenant, a relation which, according to the uniform doctrine of the cases essentially modifies and mitigates the law upon the subject. I apprehend that, as between mortgagor and mortgagee, if the annexation be such as to make it impossible to dismantle the personal from the real estate without injury to both, and especially without injury to the latter, that the personal must be considered as converted into real estate, though it was not affixed *perpetui usus causâ*.

The case of *Trappes* vs. *Harter*, 2 *Crompton & Meeson*, 152, has been the subject of a great deal of comment on both

sides. If the doctrine of that case be law, as understood by the counsel for the manufacturing company, it would be conclusive of the question as between the Company and the Bank, and hence the counsel of the Bank, seeming to feel the pressure of the case against him, has made a strong effort to shake its authority.

In many of its features it is like the case now before this Court, and, unquestionably, if the decision of Lord Lyndhurst is a true exposition of the law, the question between these parties must be considered as settled. It will be observed, upon reading his decision, that his Lordship placed his judgment upon the double ground that the machinery, being capable of removal without injury to itself and the building, and erected in a neighborhood where machinery of that kind is commonly removed, was not to be regarded as belonging to the inheritance, and that, under the circumstances of the case, as detailed in the opinion, it was not intended to be included in the property mortgaged.

The reporters of the case of *Trappes* vs. *Harter*, referring to the cases of *Boydell* vs. *M'Michael*, 1 *Crompton, Meeson & Roscoe*, 177, and *Hallen* vs. *Runder*, *ib.*, 266, suppose the authority of *Trappes* vs. *Harter* to be shaken, or at all events, that it must be regarded as having been decided on its own peculiar circumstances. But, upon examining these cases, I think it will be found that they do not impair the authority of Lord Lyndhurst's opinion in *Trappes* vs. *Harter*. The articles in *Boydell* vs. *M'Michael*, were unquestionably fixtures, and in a controversy between the mortgagees of the tenant, to whom the term and all the fixtures were expressly assigned, as a security for money lent, and the assignees of the tenant, who afterwards became a bankrupt, it was held that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees.

There was no question in that case that the articles were part of the freehold during the term, though the tenant had a right to remove them at the end of the term, and as the tenant assigned the term and the fixtures to the mortgagee, the latter

not only took the house during the term, and everything that was affixed to the freehold, but likewise the tenant's right to remove the fixtures at the end of the term. The case throughout assumes an uncontroverted position, that the articles in question were parcel of the freehold during the term, the tenant, however, having the right, during its continuance or at its end, to remove them, and by the assignment to the mortgagee, the tenant's interest in the realty, and everything affixed thereto, together with the right of removal, passed. This is the opinion of Parker, B., and Alderson, B., the latter saying, "this question turns on the nature of the property; it is clear that nothing of a freehold nature is within the meaning of the clause in the bankrupt act as to order and disposition."

In the case of *Hallen* vs. *Runder*, the property in dispute likewise consisted of fixtures put up by a tenant, and nothing more is decided than that upon an agreement between landlord and tenant, that the latter would not remove them at the expiration of his tenancy, "the former agreeing to take them at a valuation; the tenant, though he could not recover the price as for goods sold and delivered, might recover as for fixtures bargained and sold."

But the case which seems most strongly to support the judgment of the Court in *Trappes* vs. *Harter*, and to prove that the conclusion arrived at in that case, whatever may be said of a portion of the argument of the Chancellor, has not been weakened by the subsequent cases, is the case of *Hellawell* vs. *Eastwood*, 3 *Eng. Rep. in Law & Equity*, 562. The question in this last case was, whether cotton-spinning machines which were fixed by means of screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws, were by law distrainable for the rent of the mill, in which they were fixed, and this depended entirely upon whether they were part of the freehold or not. If they were, they could not be distrained, for what is a part of the freehold cannot be severed from it without detriment to the thing itself in the removal, and besides, what is fixed to the freehold is part

of the thing demised. "The question," said Parke, Baron, "is whether the machine, when fixed, is parcel of the freehold, and this is a question of fact depending on the circumstances of each case, and principally on two considerations, *first*, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them; whether it can easily be removed, *integre*, *salve*, *et commode*, or not, without injury to itself or the fabric of the building; *secondly*, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel;" and the conclusion was that the machines had not become a part of the freehold; that they had not lost the character of movable chattels, and were liable to be distrained.

The law in relation to fixtures does not seem to have engaged the attention of the Courts in this state frequently. The only reported cases are those of *Kirwan* vs. *Latour*, 1 *H. & J.*, 289, and *Coombs and Jardan*, 3 *Bland*, 284. The latter does not seem to have decided any question bearing upon the present controversy; but the former, which was regarded by the General Court as a case between vendor and vendee, is an authority, to some extent at least, in favor of the Savage Manufacturing Company.

Assuming, therefore, the rule to be that as between mortgagor and mortgagee, the question is whether the thing claimed to be a fixture is so attached as to become parcel of the freehold, which is a question of fact depending on the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them; that is, whether it can be removed or not without injury to itself or the fabric of the building, I am of opinion, upon the evidence in this case, that the machinery furnished by the Savage Manufacturing Company has not become a part of the freehold; that it has not lost the character of movable chattels, and consequently is not covered by, or within, the operation of the mortgages to the Bank and

Wilson. And in coming to this conclusion, it appears to me very reasonable to allow some weight to the parol proof which establishes the fact that the ownership of such machinery is frequently in one person, while the building in which it is placed is the property of another; and that according to the received opinion of persons who use and deal with such property they are regarded as entirely separate, and as preserving the distinctive characteristics of real and personal estate. It is not that I understand the proof as establishing a usage which would control or change the general law in the place where the usage prevails, but as a fact which may be considered in connection with the other proof bearing upon the question. Such proof was not without its influence in *Vanderpool* vs. *Van Allen*, before referred to.

The opinion which I have formed with respect to the machinery made by the Savage Manufacturing Company, does not at all conflict with *Ex parte Cotton*, 2 *Montague, Deacon & De Gex*, 725. That case merely decides that trade-fixtures put upon premises which had been previously mortgaged by one of the partners, though erected by the firm subsequently formed, belonged, upon the bankruptcy of the firm, to the mortgagee as a part of his security, and did not pass to the assignees of the partners. It seemed to be supposed that fixtures added by the firm after the mortgage would not be regarded as constituting a part of the mortgaged premises, though it was conceded that the fixtures which were upon the premises at the time of the mortgage passed by the deed to the mortgagee. The Court, while repudiating any such distinction, and asserting the right of the mortgagee to all the trade-fixtures, whether erected prior or subsequently to the execution of the mortgage, go on to say: "Of course this will not include any articles which are movable. What articles are fixtures and what movables, is often a troublesome question of fact; and if the parties differ upon it in this case, there must be a reference and an inquiry on the subject."

If the articles made by the Savage Manufacturing Company were fixtures, the case of *Ex parte Cotton* would apply as it does

apply to that portion of this machinery furnished by the Messrs. Denmead, which I think are fixtures; but in my opinion, the cotton machinery manufactured by the Savage Company retains its character of movable property, and consequently the mortagee cannot claim it.

I am, therefore, of opinion, that the Bank of Baltimore are entitled under their mortgage, as far as may be required for the payment of their debt, to the proceeds of the mortgaged premises; and that the machinery made and erected in this cotton-mill by Adam and William Denmead, except the looms, is to be regarded as part and parcel of the mortgaged premises, and subject as such to the payment of said debt.

After the satisfaction of the mortgage to the Bank, the residue of the proceeds of sale of the mortgaged premises, together with the proceeds of the ten acres not included in the mortgage to the Bank, but included in the mortgage to James Wilson, is to be applied to the payment of the claim due the latter.

The Savage Manufacturing Company is entitled to the proceeds of the machinery manufactured by and mortgaged to said Company on the 22d of February, 1848.

Poole and Fergusson, who claim for the repairs to the machinery in the Powhatan Factory, and for cast-iron pipes put in the Pocahontas Factory, cannot maintain their claim in opposition to the claims of the mortgagees; so far at least as the repairs are concerned. The lien for repairs must be postponed to the lien of the prior incumbrancers—the Bank and Wilson. The Court is not quite prepared at this time to say whether the cast-iron pipes, made and put by Poole and Fergusson in the Pocahontas Factory, picking-house, and repair-shop attached thereto, are or are not fixtures. If they are, they constitute a part of the property mortgaged to the Bank and Wilson in 1841 and 1845, and their proceeds must be applied accordingly. If they are not fixtures, then they are covered by the mortgage to Spence and Reed of the 2d of April, 1849, though their claim may be subject to the lien of the mechanic. In stating the account, the Auditor will present the question

in three aspects. In one account treating them as fixtures, and applicable to the payment of the prior mortgages; in the other as personal estate, and applicable to the satisfaction of the mortgage of Spence and Reed; and in a third account, as subject to the mechanics' lien: and these questions will be reserved for further consideration and order.

In regard to the question raised by one of the exceptions as to the apportionment of the rent received by the trustees, I am of opinion that it should not be credited to the several lien holders in proportion to the amount of their several claims. The proof shows the machinery is impaired in value by its use to a much greater extent than the buildings and real estate; and, therefore, in apportioning the rent there should be given to the holders of the lien on the machinery such proportion thereof, as according to the proof they would be entitled to, in view of the greater wear and tear to which the machinery is exposed.

The foregoing views are expressed as indicating the opinion of the Court upon the questions which have been argued, and an order would now be passed sending the cause to the Auditor to state accounts, in conformity therewith, but for the pendency of two petitions; one filed by William Mason and William Mason, Jr., on the 22d December last, and the other by Adam and William Denmead on the 31st of January last. The hearing of these petitions has been postponed by consent of counsel; and as it cannot now be known what effect they will have upon the rights of the parties to them, it would be premature to pass an order determining those rights.

An order having been filed by the Savage Manufacturing Company, dismissing their exceptions and petition as to the commissions of the trustees, and their counsel fees, an order will now be passed ratifying the report of the Auditor, except as to the disputed portions thereof.

[The petition of the Denmeads afterwards coming on for hearing, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

All of the questions raised by the exception to the report of the Auditor in this case were considered, and the views of the Court expressed upon them in the opinion above; and the cause would have been referred to the Auditor to state an account accordingly, but for the interposition of two petitions, which were then depending, the hearing of which was postponed by consent of counsel. One of these petitions, that filed by William Mason, Sen., and William Mason, Jr., has been dismissed by the petitioners themselves, and is of course now out of the way; and upon that filed by Adam and William Denmead on the 31st of January last, counsel have been heard.

The nature of the claim of the Bank of Baltimore, and its title to be paid out of the proceeds of the sales made by the trustees under the decree in this case, has been fully considered, and need not now be examined. The Bank became the purchaser of the property mortgaged to secure its claim in the month of July, 1851, and subsequently, in November of the same year, sold the same to the Messrs. Mason for the price which it gave at the trustee's sale, to which was to be added the insurance and other charges paid by the Bank, amounting to little upwards of $1,400.

The Messrs. Mason have paid a part of this purchase-money, but a considerable portion remains unpaid, and the Bank retains the title to the property under the mortgage, and under the purchase made by it at the sale of the trustees as its only security. The nature of the contract between the Bank and the Messrs. Mason, and all that is material to know in relation to the transaction between them, will be found in the deposition of Mr. Jamieson examined by the petitioners, the Messrs. Denmead.

It is urged on the part of the petitioners, that under these circumstances it is not competent to the Messrs. Mason to hold the machinery, which has been decided to be a fixture, and to constitute a part of the mortgage security, as against the petitioners who made it and put it into the building; that,

however the case may be as between the petitioners and the Bank, the mortgagee, the question is a very different one between the petitioners and the Masons, for whom the machinery was made.

Assuming in this view that the machinery was a fixture, constituting a part of the freehold and covered by the mortgage to the Bank, it seems to me very clear that a purchaser from the Bank, whoever he may be, will stand clothed with the rights of the vendor, and that those rights, whatever they are, will not be affected by the nature of the dealings between this purchaser and a third party claiming in hostility to the Bank. The claim of the petitioners under the mechanics' lien law has been adjudged to be subordinate to the prior mortgage to the Bank, and when the Bank purchased at the trustee's sale it took the property wholly discharged from the lien of the petitioners, and a purchaser from it must take a title equally exempt from this lien.

If this be not so, the Bank may be deprived of the full benefit of its security. Having an unexceptionable title itself, it has a right to go into the market with that title and make the most of it, which it could not do if the person most likely to purchase must take the property subject to an incumbrance, which was of no avail against his vendor, 1 *Story's Eq., secs.* 409, 410.

But in this case the title still remains in the Bank, and it is the only security which it holds for the unpaid portion of the purchase-money, and as against the Bank, unquestionably, if the former opinion of this Court is correct, the petitioners have no claim. Their petition must therefore be dismissed.

In discussing the question presented by the petition, the counsel for the petitioners not having heard the concluding argument made by the Bank's counsel at the former hearing, took occasion (and with entire propriety) to submit some remarks upon the subject of the lien claimed by his clients, under the mechanics' lien law.

There can be no doubt, that under the original Act of 1838, ch. 205, and its several supplements, the lien of the mechanic

for work and labor and for materials furnished must be in subordination to prior incumbrances. Subject to such incumbrances, the mechanic and materiel-men have liens on the building, and on the ground covered by the building, by the 1st and 2d sections of the original Act. The 4th section of the Supplement passed in 1845, ch. 176, makes every machine thereafter to be erected, constructed, or repaired in the city of Baltimore subject to the lien, in like manner as buildings are made subject under the provisions of the original Act and the supplement.

It has been urged, that as the mechanic who erects or does work on a building has a lien not only on the building, but also on the ground occupied by the building, whilst the lien of the machinist is confined to the machine, the Courts should in the administration of the law incline to preserve the security of the latter, by protecting the machine, from the operation of the claims of other parties.

It will be found, however, upon reading the 4th section of the Act referred to, that the lien is, in *like manner* as buildings are, made subject under the provisions of the supplementary and the original Act, and by both the lien of the mechanic, in express terms is postponed to prior incumbrances.

If, therefore, the machinist puts up or repairs a machine, which from the nature of its annexation to the building becomes a part of it, and the building itself is subject to a mortgage, the lien of the machinist must yield to the claim of the mortgagee, and can only be asserted in subordination to it. And as, by the former opinion of this Court, it was deemed clear upon authority, that with respect to that part of the machinery furnished by the Messrs. Denmead which constituted the motive power, it was to be regarded as so affixed to the building as to be a part of it, the conclusion follows, that the lien of the machinist must give way to that of the mortgagee, unless upon further consideration effect should be given to the judgments obtained by the Messrs. Denmead in 1849, beyond what it was supposed they were entitled to upon the former argument.

It was then thought, that these judgments could not be permitted to impair the rights of third parties, because of the omission of the sheriff, by the consent of the plaintiffs, to give the public the notice directed by the Act of 1838, ch. 205, which notice by the 9th section of the supplementary Act of 1845, ch. 287, is required to furnish precise and full information of the amount of the claim, and other particulars interesting to all persons who may be concerned.

It is insisted, that as Baltimore County Court had jurisdiction to render these judgments, and the omission to give the notice was a mere irregularity, which (though perhaps ground of reversal on appeal) no Court in a collateral proceeding can for that reason refuse to give them full effect.

The question, however, is not whether the judgment shall have effect against the parties who were notified of the proceeding, but, whether they shall conclude persons who had no notice either actual or constructive, and who consequently have had no opportunity of defending their rights. It appears to me quite plain, that the legislature never, intended in passing these laws, to affect the interests of parties who had no notice, actual or constructive, of the proceedings under them; and I am by no means prepared to say, that if the person claiming the lien chooses to limit his remedy to the defendant and the person in possession of the building, that he may not do so.

Surely it would be everywhere and with one voice denounced as violative of the plainest principles of justice, that the rights of parties should be concluded by a judgment, when they were not only not summoned to resist it, but where a studious effort appears to have been made to keep them in ignorance of the proceedings which led to it. I do not, of course, mean to be understood as intimating that such design existed in this case, but simply as indicating the manifest injustice of holding the Bank to be affected by a judgment of which, upon the face of the record, they had not and were not intended to have notice.

I hold, therefore, that in denying to these judgments the full effect attributed to them, I am not impairing their efficacy

to any extent, as designed by the tribunal by whom they were rendered. I am simply saying that they cannot be allowed to conclude the rights of strangers to them.

The proceedings under the lien law, though in the nature of proceedings *in rem*, are not purely of that character. The suit is *inter partes*, and must be confined to such parties. The 16th section of the original Act, says the "*scire facias* shall be served as a summons upon the defendant therein named, and a copy left with the person residing in the building, if occupied as a residence," &c. If, therefore, the notice by advertisement in the newspapers is not given, as directed by the 17th section, the judgment must be limited in its operation to the parties warned according to the preceding section.

But, viewing the proceedings as strictly *in rem*, or only partaking to some extent of the nature of such proceedings, still it appears to me to be plain that actual or constructive notice must be given, and is essential to the validity of the judgment, that is, essential to its validity against all the world. In the case of *Woodruff* vs. *Taylor*, 20 *Vermont Rep.*, 65, the subject was very fully discussed by the Court, after a second argument by eminent counsel, and after speaking of the difference between proceedings purely *in rem*, and those which to some extent may be so regarded, though in form *inter partes*, the Court says, "It is just as essential to the validity of a judgment *in rem*, that *constructive* notice at least should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court." And the same principle is maintained in the case of *Bradstreet* vs. *Neptune Ins. Co.*, 3 *Sumner*, 607.

The Messrs. Denmead, then, in this case, by the form of the proceeding adopted by them to enforce their lien, have limited the operation of their judgments to the parties warned

according to the 16th section of the Act of Assembly. It is not for this Court in this collateral way to deprive them of the benefit of their judgments, so far as the parties are concerned who did appear, or were warned to appear in the County Court to assert their rights in opposition to them. But when, having themselves excused the sheriff from giving the public notice by advertisement in the newspapers, as directed by the 17th section of the law, they seek, nevertheless, to occlude all parties, they seek to do that which must strike every mind as manifestly and flagrantly unjust. So far as relates to parties who have no notice, actual or constructive, the judgment, in the language of the authority quoted, is "an arbitrary edict, not to be regarded anywhere as the judgment of a Court."

It has been urged by the counsel for the Messrs. Denmead, that the proper remedy would be by appeal to the Court of Appeals; but, according to my view of the matter, it is extremely doubtful whether an appeal in this case would lie at the instance of the Bank, as I apprehend none but parties to the judgment or decree appealed from have the right of appeal, and it is very certain that under the provisions of the Act of 1836, ch. 200, the execution of such judgment or decree cannot be stayed or delayed, unless the person or persons against whom it was rendered or passed, &c., shall give bond.

But surely it cannot, with any propriety, be said that these judgments were rendered against the Bank of Baltimore, or regarding the proceeding *in rem*, or *quasi in rem*, that they were adjudications affecting the Bank's title to the property, when it had no notice, either actual or constructive, and hence I infer that should the Bank appeal, it would be told in the Appellate Court, you are no party in any way to this proceeding, nor are your rights involved in it, and therefore you have no title to bring the record for review before the Court.

I am, therefore, relieved from the necessity of considering whether the principle settled by the Court of Appeals in *Shivers* vs. *Wilson*, 5 *H. & J.*, 130, is applicable to this case. The conclusion to which I have come is, that the judgments, though

good *inter partes*, has no operation against strangers, and that the Bank of Baltimore is a stranger.

COLLINS and ALEXANDER, for Complainants.

GEORGE H. WILLIAMS, for Savage Manufacturing Company.

J. MASON CAMPBELL, for the Denmeads.

J. MEREDITH, for the Bank.

TEACKLE, for other Claimants.

JOSEPH WHITE AND THOMAS WHITE,
vs.
THE OKISKO COMPANY ET AL.

SEPTEMBER TERM, 1852.

[CHANCERY PRACTICE—PROOF OF CLAIMS.]

WHERE a creditor seeks to offer new proof of his claim in the interval between the final report of the Auditor, made under the directions of the Court, and its ratification, though it is not matter of course, yet he will be allowed to do so under circumstances which would not entitle him to the privilege after the report has been ratified.

The general rule is not to open the account after final ratification, on the application of a creditor whose claim has been first suspended and ultimately rejected for want of proof to sustain it; yet there may be cases in which it would and ought to be relaxed.

[The facts of this case are fully set forth in the opinion.]

THE CHANCELLOR:

In this case a bill was filed by the complainants, creditors of the Okisko Company, on the 22d of June, 1849, against the said Company, and others, likewise claiming to be their creditors, praying for an injunction upon the equities stated in the bill to restrain said creditors from proceeding separately to enforce the payment of their respective claims, and for a sale

of the property mentioned in the proceedings for the benefit of all the creditors, according to their several rights and priorities. Upon this bill a decree for a sale passed on the 9th of July, 1849, appointing trustees to make the sale; and by a subsequent order, dated the 29th of November, 1850, the creditors were warned to come in and file the vouchers of their claims within three months from the date of the order, which by the printed certificate filed among the proceedings, appears to have been duly published in two daily newspapers in the city of Baltimore, as therein required.

The trustees having bonded, proceeded to advertise the property for sale; and after two unsuccessful attempts to sell, as shown by their report filed on the 9th of November, 1849, they on the 30th of October of that year, sold the property to Hugh Ely for the sum of $21,000. The purchaser afterwards, however, objected to the ratification of this sale upon several grounds, which it is not necessary particularly to notice. These objections were overruled, and by an order passed on the 7th of May, 1850, and for the reasons stated by the Court in an opinion accompanying the order, it was adjudged that unless the said purchaser complied with the terms by a day therein limited, the property should be resold by the trustees at his risk. (See 1 *Md. Ch. Decisions*, 392, and 2 *Md. Rep.*, 411, where the two previous opinions of the Chancellor in this case are reported.)

Ely, the first purchaser, not complying as directed, the trustees proceeded after due notice to resell; and on the 25th of June, 1850, made sale of the property to William D. Miller for the sum of $15,000, and this sale was duly ratified and confirmed on the 18th of November, 1850.

The case having then gone to the Auditor, in conformity with the practice, that officer, on the 7th of June, 1851, made a report distributing the net proceeds of the sale among the creditors of the Okisko Company, but stating objections to a number of the claims for the want of proof, &c. This report, which may be regarded as experimental, though made after the time limited for creditors to come in had expired, was filed

on the 9th of June of the same year. Its object was to bring before the Court, and in the presence of each other, the several creditors who claimed to be entitled to participate in the fund, to enable each to ascertain what objections would be made to his own claim, and ho whe should meet and resist, if he thought fit, the claims of his rivals; and not for the purpose of finally adjudicating upon and distributing the proceeds of the sale.

The Auditor, in this report, directs the attention of the Court to the probable existence of a claim for a sum of $1,600, founded on a proceeding in Howard District Court to enforce the mechanics' lien, which had resulted in a judgment against the Company, from which the trustees had entered an appeal (see 3 *Md. Rep.*, 168), which was still pending, and submits the propriety of suspending the distribution of the funds until the objections should be removed. The claim itself was not filed, the only knowledge which the auditor had of its existence being derived from a petition filed on the 30th of May, 1851, by the counsel who conducted the cause on the part of the trustees.

The trustees filed exceptions to this first report of the Auditor on the 17th of June, 1851; and on the 10th of July following, an order was passed sending the case back for a new audit, with directions to allow the trustees a commission of 5 per cent. on the net proceeds of the sale, in addition to the commission allowed them in the first report, upon the ground that in making the second sale they were to be treated as attorneys recovering so much of the purchase-money by legal proceedings.

In obedience to this order, the Auditor made and filed a report on the 20th of October, 1851, accompanied with an account marked B, in which the net proceeds of the sale are distributed among the creditors, whose claims were filed and properly established; and this report having, according to the rule of the Court, been submitted during the sittings of the then ensuing December Term, on the part of certain of the creditors, and at the close of the sittings laid before the Court,

in further conformity with the rule, an order passed, on the 31st of January, 1852, ratifying and confirming it, and directing the trustees to apply the proceeds accordingly, with the exception of two inconsiderable allowances to the trustees, the payment of which was suspended.

Afterwards, to wit, on the 4th of February following, Thomas Matthews, the owner of the claim founded on the mechanics' lien, and which is designated as claim No. 50 in the Auditor's statement of claims, filed his petition, in which, for the reasons therein stated, he prayed "that the order ratifying the said report might be rescinded, and that an opportunity might be afforded him to present his claim properly authenticated," which had not theretofore been done upon this petition. On the day following an order passed, rescinding the order of ratification of the 31st of January, 1852, referring the cause again to the Auditor, with directions to state another account, in which he should reserve of the proceeds of sale a sufficient amount to cover the said claim, should the same be established.

The proceedings further show, that on the 7th of February, 1852, two days after the rescinding order passed, the Auditor addressed a letter to the counsel representing claim No. 50, notifying him of the said reference, and requesting to be furnished with a short copy of the judgment, or such information as would enable him to reserve money enough for its satisfaction; and, on the 17th day of the same month and year, a short copy was filed accordingly.

On the 17th of April, 1852, the Auditor made a report, in conformity with the order of the 5th of February preceding, in which he states that in the account accompanying it, he had applied the proceeds to the payment in full of claim No. 50; but that the character of the claim did not appear, nor could he ascertain whether, if the judgment should be affirmed upon the appeal still pending, it would be entitled to priority over the judgments now filed, or any of them.

Afterwards, on the 7th of June following, exceptions were filed by a number of the creditors to this report, several of

which were specially directed against the allowance of claim No. 50; and by an order, dated the 9th of the same month, the 19th of the then ensuing July was fixed for the hearing, with liberty to the parties in the mean time to take proof in the usual way, and upon the usual notice, in support of their respective claims; and the cause coming on, to be heard upon the exceptions, and being submitted, an order passed on the 21st of July, 1852, in which, among other things, it was said, "The payment of claim No. 50 will likewise be suspended for further order. The proof in support of it is defective, but as it is founded on the judgment of a Court of competent jurisdiction, and no order has yet been passed in the cause, by which claims not sufficiently proved are directed to be excluded, and the fund is still under the control of the Court, it would not be proper absolutely to reject it without giving the party an opportunity to remove the objections to its allowance." And the cause was, by the said order, again referred to the Auditor, with directions to state a further and final account, from which all claims should be excluded which were not sufficiently proved.

In conformity with this order, the Auditor, on the 21st of October, 1852, made his report, with an account marked D, from which claim No. 50 was excluded, no new proof in support of it having been produced. This report was filed the day after.

Exceptions were filed by Matthews, the owner of claim No. 50, to this report, upon the ground that said claim was on its face entitled to a preference, as founded on the mechanics' lien law. Upon this exception no order has yet been passed; and on the same day, to wit, the 22d of October, 1852, the said excepting creditor filed his petition, in which, among other things, it is stated, that he had always understood from the trustee who made the sale, that a proper amount of the trust fund would be retained, to answer and abide the result of the appeal which had been taken by the trustees against his claim, and which was still depending in the Court of Appeals, and praying that the cause might be again remanded to the Auditor,

with leave to the petitioner to produce the proof necessary to establish his claim, before the 30th of the month, the expense of the new audit and account to be borne by the petitioner; and upon this petition, as yet, no order has been passed. Afterwards, on the 25th of the same month and year, the petitioner filed another petition, with which he exhibits and files what he supposes to be sufficient proof of his claim, and repeating what he had said in his former petition, as to his expectation that a sum would be reserved to cover his claim, in case the Court of Appeals should affirm the judgment of the Howard District Court, he prays that the cause may be again sent to the Auditor, to state another account at his expense. Upon this petition, an order passed on the 29th of the month, in which, after observing that to grant the prayer would be contrary to the practice of the Court, and opposite to the case of *Kent* vs. *O'Hara*, 7 *G. & J.*, 212, the petition was dismissed with costs.

On the 3d of November last, Matthews filed a third petition, in which he reiterates with more fulness of detail the impression, and the grounds of the impression, upon which he and his counsel had supposed that no final order would be passed upon his claim until the appeal taken by the trustees should be heard and determined; and that he and they remained under that impression until the audit of October, 1852, was made. Upon this petition an order passed, suspending the order of the 29th of October preceding, by which the former petition had been dismissed, and for a hearing on notice to the excepting creditors, and the counsel of the parties having been heard, the question remains now to be decided.

Upon a copy of the last petition and order, the surviving trustee has endorsed and signed a statement in these words: "The undersigned surviving trustee hereby certifies that the allegation of this petition, that the claim referred to was to await the final decision of the Court of Appeals, is correct, his impression being that there was a fund to be reserved to await that issue."

The question, then, which presents itself upon these circum-

stances thus stated is, whether this party, the owner of claim No. 50, has been guilty of that kind of laches which, according to the practice of the Court, or upon equitable principles or considerations of convenience and expediency, debars him of the right to have his claim examined and decided upon its merits.

By the order of the 29th of October last, dismissing the petition filed on the 25th of that month, an opinion and judgment adverse to the petitioner was pronounced, but this was without argument on his part, and without that careful examination and consideration of all the circumstances attending this case, which I have since bestowed upon it. The order of the 31st of January last, ratifying the report of the Auditor of the 20th of October, 1851, having been rescinded, no judgment of the Court distributing the funds stands in the way, and the question now presented is precisely that which is spoken of in *Dixon* vs. *Dixon*, 1 *Maryland Ch. Decisions*, 271, that is, the creditor asks to be permitted to come in, with new proof of his claim, in the interval between the final report of the Auditor, made under the directions of the Court, and its ratification, within which period, though it is not matter of course to let the party in to offer further proof in support of his claim, he will be allowed to do so, under circumstances which would not entitle him to the privilege after the report has been ratified. The case of *Kent* vs. *O'Hara*, 7 *G. & J.*, 212, the decision of which I supposed at one time was conclusive against the present application, is not precisely like this. There the final report of the Auditor had been ratified by the Chancellor, and the application was to rescind the order of ratification, and permit the party to offer further proof of his claim. The application was refused in that case, though the Court there say: "That cases may sometimes occur, in which the rule not to open the account after final ratification, on the application of one whose claim had been first suspended and ultimately rejected, for want of proof to sustain it, might appear to operate harshly, and there may be cases in which it would and ought to be relaxed."

It is not necessary to decide here whether the general rule,

applied in *Kent* vs. *O'Hara*, would be relaxed or not, because the cases are unlike in the material circumstance, that the final report of the Auditor rejecting the petitioner's claim has not only not been ratified, but the petitioner filed his first petition for leave to offer further proof of his claim, on the same day the report itself was filed, that is, on the 22d of October, 1852. There is, moreover, this additional circumstance in favor of mitigating any general rule in its application to this case. It appears to have been the understanding of this petitioner, that his claim, though it might be established to the satisfaction of the Court, was not to be actually paid, but that a sufficient amount of the proceeds of the sale should be reserved, to await the final decision of the Court of Appeals upon the appeal taken by the trustees; and the language employed by this Court, in the order of the 5th of February, 1852, passed upon his petition filed on the day preceding, was certainly such as to give countenance to this supposition. In that order, after rescinding the order of the 31st of January preceding, the Auditor is directed "to state and report another account, distributing the *residue* of the proceeds of sale, first reserving from said proceeds such amount thereof as may be sufficient to pay the claim of the petitioner, should the same be established." The order, it will be remarked, is not to apply any portion of the proceeds to *the payment* of the petitioner's claim, but to *reserve* an adequate amount for that purpose, should it be established, the residue only, after such reservation, being directed to be distributed among the other creditors. And looking to the character of the petition, and the other proceedings in the cause, the petitioner might very reasonably assume that his claim would not be regarded as established, nor a final decision be passed upon it, until the Court of Appeals should have decided upon the appeal then and now depending in that tribunal, and this reasonable assumption might very well have been strengthened by the letter which the Auditor, with great propriety, addressed to the counsel of the petitioner two days after the date of the order. In that letter he says: "The Okisko Company case has been

referred to me to state an account, *reserving* funds to pay the claim of Thomas Matthews, should the Appellate Court decide in his favor," and asking to be furnished with a short copy of the judgment and costs, that he might ascertain the amount of the claim, or supplied with such information as would enable him to reserve money for its satisfaction.

It is certainly true that by the order of the 21st of July, 1852, the owner of claim No. 50 was apprised of the necessity of supplying more satisfactory proof, and that he is in some default for not having done so, but it is to be remembered that the account reported in obedience to that order has not been confirmed, and that on the very day the report was filed, to wit, the 22d October, 1852, the petitioner was here, by his counsel, and asked for only a delay of eight days, to enable him to furnish the evidence of his claim, and for a new audit at his expense, and that, in fact, on the 25th of the same month, being only three days after the report was filed, he did produce and file what he supposes to be sufficient proof of his claim, and repeating the offer to defray the expense of a new audit; he prayed that the proof of his claim now produced might be submitted to the Auditor for examination. This petition, as before stated, was dismissed by the order of the 29th of this month, and in so doing, I am now of opinion, upon a careful examination of the proceedings, and fuller reflection, the Court fell into error, and so thinking, I consider it my duty to repair it.

Though, as already said, I think the petitioner was in some default, yet it appears to me it is not of that gross and flagrant character, as to render it proper to shut the door of the Court in his face without ever examining his claim. It is unquestionably true, that down to the order of the 21st of July, 1852, the petitioner was warranted in supposing that no final decision would be made upon his claim until the pending appeal should be ready, and that, in the mean time, a sufficient amount to cover it would be reserved. The previous order of the Court justified him in supposing such would be the case, and this, I think (the last audit not having been confirmed), is

a sufficient excuse for the neglect of the petitioner in not furnishing evidence of his claim before that audit was filed.

The argument that the other creditors are subjected to unreasonable delay by the negligence of this petitioner, is not well founded, because those other creditors might, at any time, have received their dividends of the proceeds of sale after reserving enough to pay this claim, should it be established. The delay has grown out of the controversy in regard to this claim, that is, whether it should or should not be excluded altogether, when the true and proper question was whether a fund should be reserved to pay it, in case the Court of Appeals should affirm the judgment rendered in Howard District Court, and the claim should in other respects be entitled to be paid out of the proceeds of these sales in whole or in part.

Under all the circumstances of the case, I am of opinion that the petitioner has not forfeited his right altogether to the consideration of the Court, and I shall therefore send the case back to the Auditor, with directions to state another account at the expense of the petitioner, in which account there shall be reserved a sufficient amount to cover this claim, if, upon examining the new proof, it should be thought proper to do so, and distributing the residue of the proceeds of the sale among the other creditors according to their respective rights and priorities.

William J. Ward, for Petitioner.

J. Mason Campbell, for Complainant Creditors.

THE FARMERS' AND PLANTERS' BANK
vs.
JAMES MARTIN AND WILLIAM R. TRAVERS.

July Term, 1852.

[COMMISSION TO SOLICITOR AS FEES—PRACTICE—EVIDENCE.]

When trustees are compelled to bring suit for the purchase-money, it has been the constant practice of the Court to allow a commission of 5 per cent. to the attorney engaged by them, and when the trustee is himself an attorney, and collects the money in that capacity by a suit at law, a similar allowance has always been made to him.

Such commission, as well as the trustee's commission as such, and the costs of suit, are always deducted from the proceeds of sale before distribution is made among creditors, the effect of which is, of course, to throw these allowances upon the unpreferred creditors, when the fund is insufficient to pay all.

Such commissions will also be allowed to the trustee, where he proceeds to collect the purchase-money by proceedings for a re-sale in the same case.

Where a purchaser knew of an incumbrance on the land, consisting of ground-rent in arrear, and the property was re-sold, he cannot be allowed a credit for such incumbrance paid by him.

The fact of such knowledge on the part of the purchaser may be proved by parol, though the advertisement of sale made no mention of ground-rent in arrear as an incumbrance on the property.

The advertisement is not the contract of the parties, and it is the constant practice of trustees to introduce other terms of sale, and make known to bidders at the time of the sale, facts and circumstances affecting the title or value of the property not mentioned in the advertisement, and parol proof of such facts is always admitted when it becomes necessary to resort to it to vacate or uphold the sale.

[The facts of the case are stated in the opinion.]

The Chancellor:

The questions in controversy, arising upon the exceptions to the report of the Auditor in this case, relate to the allowance to William W. McClellan, the first purchaser, of the sum of $161 25 for arrears of ground-rent and interest thereon, due at the time of his purchase, and to the allowance to the trustee

of a commission of 5 per cent. on the amount due upon the first sale, as a compensation for his services as solicitor, the trustee being the solicitor conducting the cause.

The first purchaser being in default, proceedings were instituted against him for a re-sale, under the Act of 1841, ch. 216; and a re-sale at his risk being ordered, the Court in ratifying the second sale by an order passed on the 30th of January, 1850, in addition to the commission allowed the trustee according to the course of the Court, directed that he should be allowed a commission of 5 per cent. on the amount due upon the first sale, when collected "as compensation for his services as solicitor."

It has been the constant habit of the Court, when its trustees employed to sell property are compelled to bring suit to enforce the payment of the purchase-money, to allow a commission of 5 per cent. to the attorney engaged by them; and when the trustee is himself an attorney, and collects the money in that capacity by proceedings at law, a similar allowance has always been made to him. *Post* vs. *Mackall*, 3 *Bland*, 528, 529. And this commission is always deducted from the proceeds of sale, as is the trustee's commission as such, and the costs of suit before the distribution is made among the creditors; the effect of which is, of course, to throw it upon the unpreferred creditors when the fund is insufficient to pay all. This being the case, the Auditor was quite right in his account B, in adding it to the amount due from the first purchaser to the trustee and deducting the aggregate from the proceeds of the second sale, as otherwise the burden would have been thrown upon the creditor having a preferred claim to be paid out of the fund.

The order of the 30th of January, 1850, was passed upon the assumption, that the proceeding instituted by the trustee in this case, to collect the money by a re-sale, is sufficiently analogous to proceedings at law, instituted for the same purpose, to justify the same allowance. It follows, therefore, that the exceptions taken by the first purchaser to the allowance of this commission must be overruled.

But I am of opinion that the complainant's exception to the accounts A and B, because of the credit given to the first purchaser for $161 25 cash paid by him for ground-rent and interest thereon, must be sustained.

Without intending to express an opinion upon the general question of the obligation of a purchaser at a chancery sale to look to the title, and to the incumbrances upon it, I am altogether satisfied that the agent of the purchaser in this case knew of this incumbrance, and that the property was sold subject to it. This clearly appears by the depositions of the agent, and the trustee. These depositions are admitted in evidence as if duly taken and regularly introduced into the cause, but they are excepted to, as inadmissible and incompetent for the purpose for which they are introduced, that is, for the purpose of showing that the property was sold subject to the ground-rent in arrear. The advertisement, though it speaks of the ground-rent to which the property was subject, does not say anything of rent in arrear, and the exception, it is presumed, rests upon the idea that it is not competent by parol to show any other incumbrance than that spoken of in the advertisement. The advertisement, however, is not the contract of the parties; and it has been the constant practice of trustees to introduce other terms of sale, and to make known to bidders at the time of the sale facts and circumstances affecting the title to, or value of the property, not mentioned in the advertisement, and parol proof of such facts and circumstances has always been admitted, when it became necessary to resort to it to vacate or uphold the sale. It moreover appears in this case, by the statement of the agent of the purchaser, that a paper annexed to his deposition and returned with it was shown to him by the trustee at the time of the sale, and before the bidding commenced, by which it appeared that the ground-rent in question was then due and in arrear; the trustee stating that he knew of no other claims against the property than that paper showed—there being upon it, besides the rent in arrear, a statement of the amount due upon the complainant's mortgage.

Being, therefore, satisfied that the purchaser or his agent knew of this incumbrance, and that the property was sold subject to it, I am of opinion that the complainant's exception to the credit which the Auditor has given the purchaser for it is well taken, and the cause must therefore go back to the Auditor to correct the accounts accordingly.

GRAFTON L. DULANY, for Complainant.
CHARLES F. MAYER, for the purchaser, McClellan.

[An appeal was taken by McClellan, which is still pending.]

GEORGE H. STEWART,
vs.
HARRIET BEARD ET AL.

MARCH TERM, 1852.

[CHANCERY PRACTICE.]

THOUGH it may be competent to vacate upon petition the enrolment of a decree alleged to have been obtained by surprise, yet the general law of the Court is the other way, that a decree after enrolment cannot be reheard upon petition; the remedy is by bill of review.

An order ratifying the Auditor's account, distributing the proceeds of sale under a creditor's bill, cannot be vacated by petition after enrolment, on the ground that the petitioning creditor was not aware that there would be a surplus, after paying the preferred claim of the complainant.

[The bill in this case was a creditor's bill, for the sale of the real estate of John Beard, who died intestate. The decree was passed, the land sold, and the Auditor's account distributing the proceeds ratified, when John D. Meekins, a judgment creditor of said Beard, filed his petition for the vacating of the order of ratification, under circumstances stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

The object of the petition filed in this case, by John D.

Meekins, on the 18th of July, 1851, is to open and rescind the order of the 23d of April, 1850, confirming the Auditor's report of the 18th of the preceding month of March, which report was filed on the 23d of the same month. The report so confirmed had distributed the residue of the proceeds of the sales, after paying costs and commissions and the preferred claim of the complainant, among the creditors of John Beard, giving a small dividend to each; and the petition prays that this order may be rescinded, and the residue applied to the payment of the claim of the petitioner, in exclusion of the other creditors, upon the ground that the petitioner is a judgment creditor, and entitled as such to a preference.

The decree which was passed on the 2d of July, 1849, directed the trustee to give notice to creditors to come in by a time limited with the vouchers of their claims, and all the usual necessary steps having been taken, the Auditor appropriated the proceeds of the sales among the parties apparently entitled, and his report making the appropriation was duly ratified and confirmed on the 23d of April, 1850, and the trustee directed to apply the proceeds accordingly. This order remained unchallenged for nearly fifteen months, and then, for the first time, the Court is called upon by petition to open and cancel it, and give a different direction to the money.

Whatever may be the true extent of the powers of this Court over money raised by its decrees, my impression is, that under the circumstances of this case, the order in question should not be rescinded. That order has all the force and qualities of a decree; and although it may be competent upon petition to vacate the enrolment of a decree alleged to have been obtained by surprise, as may be inferred from the case of *Oliver* vs. *Palmer and Hamilton*, 11 *G. & J.*, 137, it is very clear that the general law of the Court is the other way, and that after a decree has been enrolled, it cannot be reheard upon petition, and that the remedy is by bill of review, *Burch* vs. *Scott*, 1 *G. & J.*, 393. Several terms had intervened between the passage of this order, and the filing of the petition which seeks to vacate it. It is an application, then, (by peti-

tion), to open and vacate a decree which has been enrolled, not upon the ground of surprise, because the petitioner does not allege surprise, or any fact from which surprise may be inferred, but upon the ground that until recently before he filed his petition, he was not aware that there would be a surplus, after paying the preferred claim of the complainant. The petitioner does not allege that he had no notice of the decree, or of the sale under the decree, and it is therefore fair to infer that he had such notice. He had been invited to come in under the decree, by the order of publication, but neglected to do so, simply because he thought fit to assume that there would be no surplus; and then, fifteen months after the Court had directed that surplus to be distributed among parties more attentive to their interests than himself, he asks to have the order rescinded, and the money paid to him. To grant his prayer under such circumstances, would, in the language of the Court of Appeals, in *Burch* vs. *Scott*, be establishing "a lax principle of practice, productive of the most deleterious consequences in the administration of equitable jurisprudence."

This is not an application by the purchaser to decree the money to be applied to remove incumbrances from the title, or restored to him in consequence of a defect in the title, and therefore the remarks of the Court of Appeals, in the case of *Glenn* vs. *Clapp*, 11 *G. & J.*, 1, have no application. The purchaser's title here is supposed to be good, no matter how this question may be decided. The question presented, is between the petitioner and the other creditors of Beard. The latter came in under the decree, as they were invited to do. The petitioner did not do so, but after delaying for fifteen months after the Court had adjudicated upon the subject, he comes in, and asks to have the adjudication opened and reversed. My opinion is, he comes too late, and his petition will be dismissed.

A. RANDALL, for the Petitioner.

FRANK H. STOCKETT, for the other Creditors.

EARLE AND McNIER
vs.
DAWES ET AL.

July Term, 1849.

[ILLEGITIMATE CHILDREN—CONSTRUCTION OF DEEDS—CONDITION PRECEDENT.]

A WOMAN died intestate, leaving an illegitimate son and other children born in lawful wedlock. *Held*, that by the Act of 1825, ch. 156, the illegitimate son was entitled to share equally with the other children in the mother's estate.

A deed recited that the grantor was anxious to secure to the grantee his undivided interest in certain land, upon condition that he was to retain the use and enjoyment of it during his life, and in consideration of these premises, and of natural love and affection, conveyed the property to the grantee upon condition that the grantor died before the grantee, and not otherwise, with *habendum* to the grantee and her heirs, subject to the condition aforesaid. The grantor survived the grantee. HELD—that this was clearly a condition *precedent*, and not being fulfilled, nothing passed by the deed.

Whether a condition be precedent or subsequent is always a question of intent, and it is immaterial where the clause creating the condition be placed in the deed.

Conditions precedent must be punctually and literally performed before the estate can vest.

A Court of Equity will never vest an estate where, by reason of a condition precedent, it will not vest at law.

[The facts of the case necessary for an understanding of the Chancellor's opinion are sufficiently set out therein.]

THE CHANCELLOR:

This case, which is submitted upon arguments, in writing, of the solicitors of the parties, presents two questions.

The first depends upon the construction of the Act of 1825, ch. 156, relating to illegitimate children. It appears that the defendant, B. M. Dawes, son of Mrs. Dawes, is an illegitimate child, and that his mother, Elizabeth Dawes, died intestate, leaving this son and other children born in lawful wedlock, and the question now raised is, whether this illegitimate son is entitled to participate in the estate of his mother as co-heir with the other children.

The argument of the counsel for some of the defendants is, that the Act of 1825 does not embrace the case of a female who leaves legitimate and illegitimate children, but operates only when the mother dies, leaving an illegitimate child or children. Such, however, does not seem to me to be the true construction of the Act. Its language is, that from and after its passage, "the illegitimate child or children of any female, and the issue of any such illegitimate child or children, be, and they are hereby declared to be, able and capable in law to inherit both real and personal estate from their mother, or from each other, and from the descendants of each other, as the case may be, in the same manner as if born in lawful wedlock."

There is certainly nothing in the words of the Act which should confine its operation to the case of a woman leaving none but illegitimate offspring, and I can conceive of no public policy looking to the morals of society, which recommends the restricted construction contended for. If the law be as the defendants' counsel supposes, then an unmarried woman who has wandered or been seduced from the path of virtue, can never marry and give birth to legitimate offspring, without incurring the risk of cutting off the innocent fruit of her crime from the benefit of any property she may leave, as from a variety of circumstances it may be found impossible to bring such offspring, within the provision of the law of 1820, ch. 191. She may either not marry the father of her illegitimate child, or if she does, he may not choose to acknowledge it as prescribed by that Act.

But, independent of any such reasoning, the language of the Act of 1825 leaves, as I think, no room for doubt upon the subject. The illegitimate child or children take and inherit from the mother as if born in lawful wedlock. They are, therefore, so far as the estate of the mother is concerned, placed in the condition of legitimate children in all respects, and to every intent, and it can make no difference whether the mother leaves other children born in lawful wedlock. Those born out of wedlock are, by the force of this legislative enactment, made to take

as if born in it. The stain of their birth, so far as respects the capacity to inherit from the mother and from each other is removed, and the birth of other children of the same mother, under happier circumstances, was never designed by the makers of the law to renew the blot with its disabling consequences.

The second question arises upon the deed of William Earle to Elizabeth Dawes, dated the 3d of August, 1839, which recites that the grantor, in the event of his dying before the said Elizabeth, is anxious to secure to her and her heirs his undivided interest in the estate of his father, Thomas Earle, upon condition that, during the life of the grantor, he was to retain and exercise full and complete control over the property, and to receive and enjoy the rents, issues, and profits thereof, and in consideration of the premises thus recited, and of natural love and affection, Earle, by the deed, conveyed to Mrs. Dawes the property in question, upon condition, nevertheless, that he, the grantor, died before her, and not otherwise, with *habendum* to her and her heirs, subject to the condition aforesaid.

The condition has not been complied with, Mrs. Dawes being dead, and Earle, the grantor, being alive; and the argument of the counsel for her heirs is that the condition is void, either as a condition subsequent, or as being inconsistent with the estate given by the deed.

But it appears to me very clear, that the condition that Mrs. Dawes should survive Earle was a *precedent* and not a subsequent condition, and as the event has not taken place, the estate never vested in her. Earle reserved the possession and use of the property to himself during his life, and in the granting part and *habendum* of the deed, her title is expressly made to depend upon her surviving him—upon condition that he dies before her, and not otherwise.

Whether a condition is to be construed to be precedent or subsequent is always a question of intent, and it is immaterial whether the clause creating the condition is placed prior or posterior in the deed, the question, without regard to locality,

always being whether the thing is to happen before or after the estate is to vest. 2 *Thos. Coke*, 19 *note k*. And, in the same note it is stated, and there can be no doubt of the principle, that conditions precedent must be punctually performed before the estate can vest. And the authorities all show that even a Court of Equity will never vest an estate where, by reason of a condition precedent, it will not vest at law. *Popham* vs. *Bampfield*, 1 *Vernon*, 83. A condition precedent, says Chancellor Kent, must be literally performed, and even a Court of Chancery will never vest an estate where, by reason of a condition precedent unperformed, it will not vest at law. 4 *Kent*, 125; *City Bank et al.* vs. *Smith*, 3 *G. & J.*, 265, 281.

In the case under consideration, there can be no doubt whatever of the intention of the grantor in the deed. He did not mean, as insisted by the counsel for the defendants, to give Mrs. Dawes a title *in presenti*. On the contrary, he retained the title and the enjoyment of the property during his own life, and said that only in case she was the longest liver should she have it. Whether the deed was to operate as a testamentary disposition of the property, or in any other way, is not material, as it is too clear for argument, upon its face and from its unambiguous terms, that the condition upon which Mrs. Dawes's title was to vest was that she should survive the grantor. Earle certainly had a right to prescribe his own terms when making a gratuitous disposition of his property. He has done so by imposing a precedent condition, which has not been performed, and this Court cannot vest the estate. My opinion, therefore, is that nothing has passed by the deed.

The counsel may prepare a decree according to these views.

Frank H. Stockett, for Complainants.
Cornelius M'Lean, for Defendants.

WILLIAM W. McCLELLAN AND MARIA, HIS WIFE,
vs.
JOHN P. KENNEDY ET AL.

DECEMBER TERM, 1852.

[RELEASE BY WARD TO GUARDIAN—EVIDENCE.]

ACCOUNTS of a guardian, passed by the Orphans' Court, admitting an indebtedness to his ward, are *prima facie* evidence of such indebtedness against the grantees of the guardian claiming under a deed executed by him subsequent to the passage of the accounts.

The evident intention of the 7th section of the Act of 1829, ch. 216, which makes releases, executed by a female ward of the age of eighteen to her guardian, as valid as if she was of full age, was that the release should be a release executed to him *who had been* guardian, but whose office had ceased by the arrival of the female to the age of eighteen.

A female ward attained the age of eighteen on the 9th of March, 1834, and on the 12th of the same month she executed a release to her former guardian, who had been deposed from his office nearly nine years before, of all claims she had against him as such guardian. HELD—

That the authorities which speak of the suspicion and jealousy with which the Courts view transactions between guardians and wards, and others occupying fiduciary relations immediately after such relations are dissolved, do not apply, and the release must be regarded as a free and voluntary act, which she cannot afterwards repudiate.

A father married his step-daughter on the 26th of February, 1825, and on the 23d of March following, she conveyed to her supposed husband all her property of every description, being a large amount, for a nominal consideration, acknowledging the deed as a *feme sole*, and was described as, H. A. M. "otherwise called" H. A. B. (her maiden name). On the day following, she united with her husband in a deed of the same property to a third person, who on the next day reconveyed to the husband. HELD—that these deeds were fraudulent and void.

The property above spoken of was afterwards reconveyed to the wife, and the bill in this case was filed by the ward, who had executed the above-mentioned release; and her husband, against her former guardian, who was also the husband of the wife to whom the property had been so reconveyed, seeking to make that property responsible for her claim, HELD—

That though the release may have been gratuitously executed, yet she cannot be permitted to repudiate it as against the wife to whom the property, of which she had been unfairly deprived, had been restored.

A proceeding to set aside this release, against the guardian alone, to which

the wife was not a party, and the decree obtained thereunder, can have no operation as against the wife.

If that proceeding was instituted for the purpose of removing the lease out of the way, and subjecting the wife's property to the payment of the ward's claim, it was essential that the wife should have been made a party, and the decree would otherwise, as to her, be fraudulent and void.

[The bill in this case was filed on the 15th of December, 1841, by William W. McClellan and Maria, his wife, and states that the complainant, Maria, who is the daughter of Richard Bennet Mitchell, while an infant, became entitled to a large estate; that her said father was duly appointed her guardian, took possession of her property, and rendered several accounts thereof to the Orphans' Court; and that, by the final one rendered on the 5th of March, 1834, he was indebted to the said Maria, as his ward, in the sum of $14,891 14, which sum, with interest from that day, the bill charges to be still due and unpaid, with some small deductions. That said Maria attained the age of eighteen years on the 9th of March, 1834, and married the complainant, William, on the 11th of December, 1837. That to secure payment to said Maria, of all sums due by said Richard as such guardian, to said Maria and her sister Elizabeth, now deceased, (of whom he was likewise guardian), said Richard conveyed by deed, dated the 25th of August, 1825, to John P. Kennedy and John Glenn, all his real and personal estate, large and valuable, including particularly all the property conveyed to him by deeds from Henrietta A. Bedford and Thomas H. Wright; that said conveyance being in trust for the object aforesaid, was accepted by said Kennedy and Glenn, but they, without making any payment to the said Maria, or any sales towards that end, upon some arrangement with the said Henrietta and one John Hillen, for their indemnification against the claim of the said Maria, and her rights and demands under said trust, executed a deed, dated 2d of August, 1827, conveying to said Henrietta and her heirs all the estate which was conveyed to them by said Richard B. Mitchell, which deed was confirmed by another from the same parties, dated the 25th of October, 1832. That

said Henrietta, by deed, dated the 18th of October, 1827, conveyed to said Hillen a part of said property in trust, to sell the same, and apply the proceeds to satisfy the claims provided for by the said deed of trust to Kennedy and Glenn; and that under this deed, said Hillen has sold two pieces of ground, one to the Union Bank of Maryland, and the other to Rezin Wright; and that under color of said deed, the said Hillen also conveyed another parcel of said estate to said R. B. Mitchell, which has since been sold under a decree of this Court, to satisfy part of the complainants' claim against said Richard, as guardian as aforesaid, as by the proceedings in the cause wherein said decree was passed, between the present complainants as plaintiffs, and said Richard and Elizabeth A. Mitchell, and said Kennedy and Glenn as defendants, will appear. That the proceeds of the sales to the Union Bank and Wright were applied to satisfy debts of said Richard, other than his liabilities to the complainant, Maria. That said Elizabeth A. Mitchell heretofore released to said Richard, and duly and effectually declared herself satisfied for all demands against said Richard, as her guardian as aforesaid; and that she has since died. The bill prays that all the property conveyed to Kennedy and Glenn (except that sold by Hillen to the Union Bank, Wright, and Mitchell) may be sold, and the claim of the complainant, Maria, satisfied out of the proceeds; that Kennedy and Glenn may account for all their proceedings as trustees as aforesaid; and if complainants so elect, that said Henrietta may be decreed to pay complainants all the money she may have received from sales of any part of said estate, and that the executors of Hillen may account for all moneys received by their testator, from any sales under color of the deed to him, and if complainants so elect, pay them all such sums of money as under said obligation of indemnity might be claimed by said Kennedy and Glenn from said Hillen, and for general relief.

The defendants to this bill were, the said Henrietta A. Bedford, Richard B. Mitchell, Kennedy and Glenn, the executors of Elizabeth A. Mitchell, and John Hillen, the three former of

whom, together with the executors of Hillen, answered jointly, and admit the guardianship of said Richard B. Mitchell, his indebtedness to his ward, the complainant, Maria, on the 5th of March, 1834, in the sum of $14,891 14; and that said Maria attained the age of eighteen years, and married, as stated in the bill. Their answer then states and charges, that said Henrietta A. Bedford was the daughter of Guning S. and Elizabeth Bedford (the latter being the only child of Daniel Deady, formerly of Baltimore); that her father died in 1809, and her mother afterwards married the said Richard Bennet Mitchell, and died in 1816. That by his marriage with her mother, the said Richard became her guardian, she having become possessed of a large property, by the will of her grandfather, the said Deady. That being young and inexperienced, and left altogether under the guidance and authority of the said Richard, she was unhappily persuaded by him to become his wife, and not knowing that in her circumstances and relationship, this was forbidden by the laws of Maryland, she was married to him. That whilst married to her mother, the said Richard had three children, Elizabeth, Maria, and Frederick, the latter of whom died a minor, and that Elizabeth has also died within a few years past. That the marriage between the said Richard and Henrietta took place on the 26th of February, 1825, and on the 23d of March following, the said Richard, as this defendant Henrietta alleges, using his influence over her, which was at that time greatly increased by the peculiar circumstances attending his pretended marriage, and exerting a control over her, which deprived her of the free exercise of her will and judgment, induced her to execute a deed to him, dated on that day, by which she conveyed to him all the property and estate which she had received under the will of her grandfather, being all the property and estate of which she was possessed; that on the following day (24th of March), she was in like manner induced to join with the said Mitchell, in a conveyance of all the said property to one Thomas H. Wright, and that on the 25th of March, 1825, being the next day, the said Wright reconveyed all said property to said

Mitchell, by which proceedings he became possessed of everything she had previously owned. That these conveyances were obtained from her, under a full and complete persuasion that she was at that time his wife, she being aware of no legal impediment to her marriage.

The answer further states, that this marriage was subsequently renounced by the parties, and that said Henrietta, upon becoming acquainted with its nullity, from that time no longer cohabited with the said Mitchell, who was afterwards prosecuted criminally and convicted for his infraction of the law.

The defendants, Kennedy and Glenn, further state, that soon after this marriage, to wit, on the 25th of August, 1825, for what reasons they are not aware, said Mitchell executed to them a deed of trust of all the property which had been conveyed to him by said Henrietta, in trust, *first*, to sell the whole or part thereof; *secondly*, after paying expenses, to pay the claims of the grantor's two daughters, Elizabeth and Maria, his wards; and *third*, to pay over the residue to him. That about the date of that deed, they understood that said Henrietta, and her two half-sisters, Maria and Elizabeth, were living on good terms, and they were then and subsequently frequently informed by said Mitchell, that both Elizabeth and Maria had expressed determination to release their father from all claims they might have against him, when they should come of age. That after the prosecution against Mitchell, above referred to, and after said Henrietta had separated herself from him, and taken shelter under the protection of her friends, proceedings in Chancery was instituted by her, to set aside her deeds before referred to, made on the 23d and 24th of March, 1825, by a bill filed in this Court, in July, 1826, setting forth the grounds upon which she asked a decree declaring them void, and to compel a reconveyance of the property, to which proceedings the defendants beg leave to refer, and to make the same, and the facts therein stated, part of this their answer. That about this time, also, proceedings were instituted in the Orphans' Court of Baltimore County, to deprive Mitchell of the guardianship of his daughters, and an order to

that effect was passed, and John Hillen was appointed guardian in his place. That from the time of filing the above bill in Chancery, and their becoming acquainted with all the circumstances of the case, they never had a doubt but that Mitchell had improperly, and by exercise of undue influence over the said Henrietta, and under a misconception on her part of her relations and duties to him, obtained the deeds of March, 1825, and that the same would be set aside and annulled; and being under this impression, they lent their aid to obtain an arrangement between the parties, by which further litigation, and its unpleasant disclosures of facts to the public, relating to the unfortunate and disastrous incident of the marriage might be prevented, and the interests of the said Henrietta be protected as fully as by a decree. These considerations led to a settlement, by which the proceedings in Chancery were abandoned, and they (Kennedy and Glenn), together with said Mitchell, executed a deed to the said Henrietta, on the 2d of August, 1827, reconveying to her, as stated in the bill, all the property they had derived from Mitchell. That indemnity was given to them by said Henrietta and John Hillen, as part of said arrangement, said indemnity being intended to protect them against any possible demand that persons conceiving themselves to have a claim might make. They admit they executed the deed of the 25th of October, 1832, as stated in the bill. They admit that it is true, that said Elizabeth A. Mitchell executed the release, as stated in the bill, on the 17th of November, 1827, immediately after she came of age, and was no more, as they understood, than a compliance with her previously often-expressed purpose.

And these defendants further state (a fact which seems carefully excluded from the bill) that the complainant Maria also, upon her coming of age, and upon the rendition of her father's final account as her guardian, in like manner executed a full and complete release of all demands against him, declaring herself satisfied and paid all that, by the account rendered, appeared to be due by her said guardian to her; said release being executed on the 12th of March, 1834, a copy of which, toge-

ther with the account of her said guardian rendered at that time, are filed with the answer as exhibits. That if it be true, as alleged, that the complainants have heretofore obtained a decree, by which a part of this property called "Longworth" has been sold to satisfy in part the complainant's claim, such decree could only have been obtained by default, or neglect to defend the case on the part of defendants, or was given by consent of said Mitchell, and that the release of said Maria, above referred to, was either withheld from that case as from the present, or that it was not set up by those who were competent to set up and maintain the same; in any of which events, that decree cannot bind the parties to this suit. They expressly aver and charge, that the said release was freely and voluntarily made by said Maria after she arrived at age, and was made and executed in accordance with her previous often-expressed determination to execute the same when she should be competent to do so; and that it was given with the express motive of relieving her father, who was without property or the means of livelihood; that it was given from a concerted determination between her and her sister Elizabeth, both of whom had abundant means of support to do this act for the benefit of their father; that it was done by Elizabeth on her part, in 1827, freely and in good faith, and as freely and in like, good faith was it done by the said Maria when she came of age; that it was never the purpose of either to charge their father with the payment of said debts, and much less their purpose to wring from the portion of their half-sister Henrietta (a portion greater than their own, but in fact by her misfortunes rendered much less) the payment of their own father's debt to them, and by such act further to impoverish her that they might profit by it. They further charge that it is not, nor ever was the wish or the purpose of the said Maria to invalidate or set aside that release, made nearly four years before her marriage; that she does not fully concur with or join her husband in this suit, but is induced thereto by his control over her, and they pray the Court to take means to ascertain whether it is with her consent and approbation that

she joined in this bill, and whether she seeks to invalidate the release executed by her as aforesaid, and whether it is her purpose, notwithstanding this release, to take the property of her half-sister Henrietta to pay the debt which her father once owed her and which she released, as above stated.

They then aver that the debt, if any, was due and payable on the 9th of March, 1834, and long before that date; and that the same not having been demanded within three years after the same became due, is wholly barred by the statute of limitations, which they accordingly plead; and in conclusion, sum up their answer as follows:

"*First.* That the property mentioned and described in the deed of trust, from Mitchell to the defendants Kennedy and Glenn, was originally derived by the said Mitchell from the defendant, Henrietta Bedford, upon a false and fraudulent pretext of marriage, and that consequently both the original deed to Mitchell, and Mitchell's deed to the defendants, Kennedy and Glenn, were void. This consideration was the ground upon which the case in Chancery to set aside the deed was settled, the suit withdrawn, and the property reconveyed by Kennedy, Glenn and Mitchell, to the said Henrietta.

"*Second.* That there was nothing in the deed of trust to prevent the parties thereto from conveying the property to the said Henrietta, she agreeing on her part to meet any engagement which the trust might have created, if it were valid.

"*Third.* That there is no just claim on the part of the complainants, the same having been released. That said release is intentionally kept out of view by the complainants, and that the complainant, Maria, does not voluntarily concur in this suit to invalidate said release.

"*Fourth.* That the claim of the complainants, if they ever had any, is barred by limitations and cannot be recovered."

The *documentary proof* in the case, consists of the various deeds referred to in the bill and answers. 1st. The deed of the 23d of March, 1825, "between Henrietta A. Mitchell, otherwise called Henrietta A. Bedford" and Richard Bennet Mitchell, by which the former conveys to the latter, in fee

simple, for the nominal consideration of "five dollars," all the property of every description to which "she is in any manner entitled under the last wills and testaments of her grandfather, Daniel Deady," and "her grandmother, Winefred A. Pollock," or under either of them. This deed was acknowledged by the grantor in the usual way, as a *feme sole*, and not as a married woman. 2d. The deed of the 24th of March, 1825, "between Richard Bennet Mitchell and Henrietta A. Mitchell, his wife, lately Henrietta A. Bedford, and Thomas H. Wright," by which the former conveyed to the latter the same property absolutely, in fee simple, for the consideration of "five dollars." This deed was acknowledged by the grantor, Henrietta A., in due form as the wife of the said Richard. 3d. The deed of the 25th of March, 1825, from said Thomas H. Wright, reconveying the same property to Richard B. Mitchell, in fee also, for the consideration of the sum of "five dollars." 4th. The deed of trust of the 25th of August, 1825, by which the said Richard B. Mitchell, for the nominal consideration of five dollars, "and also for divers good causes and other valuable considerations," conveyed to John P. Kennedy and John Glenn, all the property of every description to which the grantor is in any manner entitled under the deeds above mentioned, or "in any other way whatsoever, whether in possession, reversion, remainder, or expectancy, or otherwise howsoever," *in trust*, to sell and dispose of the same or any part thereof as to them shall seem most advantageous, for cash or on credit, and apply the proceeds, 1st, to the payment of costs and expenses attending the execution of the trust; 2d, "to secure and insure the payment of all sums of money, now or that may hereafter be due, owing, or payable to Elizabeth Mitchell and Maria Mitchell, from the said Richard Bennet Mitchell as their guardian;" and 3d, to pay the residue after satisfying the above objects to the grantor, his heirs or assigns. 5th. The deed of the 2d of August, 1827, from Kennedy, Glenn and Mitchell, to Henrietta A. Bedford, by which, after reciting the deed of trust from said Mitchell to Glenn and Kennedy of the 25th of August, 1825, and "that whereas, the

said Henrietta A. Bedford is willing and hath agreed to pay and satisfy all and singular the debts due by the said Richard Bennet Mitchell, and intended to be secured and paid by and from the said trust fund, and the said Henrietta A. Bedford hath actually paid or secured to be paid all and singular the aforesaid debts, and hath also agreed to indemnify and save harmless the said John P. Kennedy and John Glenn, from all responsibility and engagements heretofore incurred or entered into by or on account of the aforesaid trust," the grantors convey the property therein described to the said Henrietta A. Bedford in fee simple. 6th. The deed of the 18th of October, 1827, from Henrietta A. Bedford to John Hillen. This deed recites that whereas, in the deed last mentioned, "it is witnessed, that in consideration that the said Henrietta A. Bedford had undertaken to indemnify and save harmless the said Kennedy and Glenn, on account of certain debts due and owing by said Richard B. Mitchell, and therein mentioned, or the non-payment thereof," the said Glenn and Kennedy secured to her the property therein and hereinafter mentioned, "and, whereas, the said John Hillen hath agreed to become, and hath actually become bound and engaged, together with the said Henrietta A. Bedford, and as her security in a penal bond to the said Kennedy and Glenn, conditioned to secure them harmless, as aforesaid, and for the purpose of securing and saving harmless the said John Hillen, on account of the said securityship, as also for the purpose of enabling the said John Hillen to raise money for the payment of the said debts, or some of them, by a sale of the premises hereby conveyed or a part thereof," and then conveys the same property mentioned in the preceding conveyance to said John Hillen, *in trust*, to sell the same or any part thereof, and apply the proceeds, 1st, to the payment of the expenses of the trust; 2d, "to the payment of all or any of the debts hereinbefore mentioned, with the interest and costs thereon;" and 3d, to pay the balance and such of the property as may remain unsold to the grantor and her heirs and assigns. 7th. The deed of the 5th of October, 1832, from said Kennedy, Glenn and Mitchell, to Hen-

rietta A. Bedford, confirming their deed of the 28th of August, 1825, and curing some supposed defect in the description of the property conveyed. These several deeds were all duly recorded.

The complainants also filed as evidence, two accounts of Richard B. Mitchell, as guardian of Maria Mitchell, passed by the Orphans' Court, the one dated the 18th of April, 1825, and showing a balance due the ward of $10,809 55. The other called the "fourth and final account" of said guardian, dated the 12th of March, 1834, showing a balance due the ward of $14,891 14, and craves an allowance for that amount, "for property and money delivered and paid over to his ward, the said Maria Mitchell, she being now of age, as per release recorded appears." Also, a release by said John Hillen to Henrietta A. Bedford, dated the 2d of April, 1834, of the deed of trust of the 18th of October, 1827. This release, after reciting the object of the said deed of the 18th of October, 1827, and the securityship of said Hillen, and that, by the sale and conveyance thereunder by Hillen of two parcels of the property thereby conveyed, namely, one to the Union Bank of Maryland, and the other to Rezin Wright, "and from and by the income of said trust estate and property, and otherwise all the debts, costs, commissions, and expenses mentioned, or intended to be secured by the deed of trust above referred to from the said Henrietta A. Bedford to the said John Hillen, have been paid, discharged, and fully satisfied, and the said John Hillen has become and is wholly relieved and exonerated from the securityship aforesaid, and all liability heretofore assumed for the said Henrietta A. Bedford, as is hereby acknowledged by the party of the first part hereto, wherefore this indenture is executed, and is intended to operate as a release and reconveyance of all said trust property and premises, excepting the parts" sold and conveyed as aforesaid, and excepting also the farm called "Longworth," and the slaves and personal property thereon, which were conveyed and released absolutely by said Henrietta to said R. B. Mit-

chell, then reconveys the residue to the said Henrietta A. Bedford, her heirs and assigns.

The complainants also filed a transcript of the proceedings upon a bill filed in this Court by the present complainants, on the 21st of May, 1838, against Richard B. Mitchell, to set aside certain conveyances made by the complainant, Maria, among which was the release by her to him as guardian, referred to in the answers of the defendants. These proceedings resulted in a decree passed by the Chancellor (*Bland*), on the 1st of July, 1840, declaring the conveyance fraudulent, and confirming the Auditor's account, which set aside the release referred to. To this record the defendants excepted, upon the ground that they were not parties to the suit, and the decree was therefore not binding upon them, and that they being parties in interest, the omission to make them parties to that suit was a fraud.

The *defendants* on their part proved that Richard B. Mitchell was removed from the guardianship of his children, Elizabeth and Maria, by an order of the Orphans' Court, passed on the 29th of June, 1825, and John Hillen appointed guardian in his place on the 2d of July following. That Richard B. Mitchell was indicted in October, 1825, for marrying his stepdaughter, the said Henrietta A. Bedford, and was subsequently convicted and fined under this indictment. He then offered the following release, executed by the complainant, Maria, before a justice of the peace, on the 12th of March, 1834, "Know all men by these presents, that I, Maria Mitchell, one of the heirs and legal representatives of Daniel Deady, deceased, have this day received from Richard B. Mitchell, my late guardian, possession of the following property and cash, viz.:

"Possession of one-fifth of one-sixth of sundry leasehold estate, . . .	$2,550 00
Also one-fifth of one-sixth of same, .	330 13
And in cash, ...	11,711 14
Making in the whole the amount of, .	$14,891 14

being in full of all property and cash due to me by my said guardian, and in consideration thereof, I do hereby release, acquit, exonerate, and discharge the said Richard B. Mitchell, his heirs, executors, and administrators, of and from all and every action, suit, claim, or demand, which could or might possibly be brought, exhibited, or prosecuted against him, them, or any of them, for or on account of the said sum of money and property, or the payment thereof, hereby declaring myself fully satisfied, contented, and paid the said amount as above specified." This release was duly recorded in the Register of Wills' office in Baltimore County. They also offered the parol testimony of Dr. Gunning S. Bedford, the brother of said Henrietta A. Bedford, in relation to the marriage of his sister with the said Richard B. Mitchell, and the undue influence exercised over by him, and sustaining the allegations of the answer in other particulars. This evidence the complainants excepted upon the ground that it consisted of declarations made by said Henrietta, and was mere hearsay. The cause coming on for final hearing, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

Assuming that the sole object of the bill filed in this cause is to affect the property which originally belonged to *Henrietta A. Bedford*, and which, by the conveyances mentioned in the proceedings, became vested in John P. Kennedy and John Glenn, on the 25th of August, 1825, and I am quite satisfied that the merits are with the defendants.

This conclusion has been formed after listening with great attention to the very able arguments of counsel on both sides, and a careful examination of the proceedings which make up the record before me.

These proceedings show that the form of a marriage took place between Richard Bennet Mitchell, and his stepdaughter *Henrietta A. Bedford*, on or about the 26th of February, 1825, she at that time owning and being possessed of a large estate real and personal. Within less than one month from

the date of this illegal marriage, to wit, on the 23d of March following, she conveyed to Mitchell absolutely, for the nominal consideration of five dollars, the whole of her estate of every kind and description whatever. In this deed the grantor is described as Henrietta A. Mitchell, otherwise called Henrietta A. Bedford. From this circumstance, and from the absence of a privy examination of the grantor, it has been inferred that doubts were then entertained of the validity of the marriage. But on the day following, another deed was executed by Mitchell and the said Henrietta A., as his wife, conveying the same property to Thomas A. Wright, which was acknowledged by her as a married woman, and on the succeeding day, that is, on the 25th of March, 1825, Wright, the grantee, reconveyed to Mitchell, thus so far as the forms of law are concerned, vesting the whole estate of this female in the man who had been the husband of her mother, and who consequently stood towards her in a relation of affinity which forbade his being her husband.

Looking at this transaction independent of the parol proof which had been excepted to, and I think no court of justice on earth would hesitate to condemn it, and if it could be done without prejudice to the rights of innocent third parties, restore to the injured and deluded female the property wrongfully taken from her. What possible motive can be attributed to Mrs. Bedford in the execution of these conveyances (conceding that no undue influence was exerted towards her), but a desire or a willingness to vest in the man to whom she supposed she was lawfully married, the property which belonged to her? If she had been convinced of the invalidity of the marriage, and we are to judge of her conduct and suppose her to be influenced by the feelings and motives which usually actuate the human heart, we must be brought to the conclusion that Mitchell was the person of all the world to whom she would have been least likely to make a gratuitous conveyance of her estate. The wrong he had inflicted upon her was of that character which admits of no expiation. Neither time or repentance, so far as this world is concerned, could restore her

to the position of respectability from which he seduced her, and to suppose that, knowing this, and free from all restraint, she selected him as the object of her bounty, as the person to whom without consideration she should give the whole of her estate, which came from her ancestors, and leave herself a dependent upon his charity, is to suppose that against which every instinct of nature is at war.

I entertain, therefore, no doubt whatever that Henrietta A. Bedford executed the deeds in question under the conviction that she was the lawful wife of Richard B. Mitchell, and apart from the evidence of Dr. Bedford, I think there is strong ground for believing that the influence of a husband was exerted to procure the conveyances from her. The proximity of the deeds to the marriage, in point of time, is a circumstance which cannot be overlooked, and is pregnant with suspicion. Within less than one month from the nuptials, the stepdaughter and wife is divested of her whole estate. He who had been husband to her mother, and to whom she had in the lifetime of her mother stood in the relation of daughter, took her to wife, and before the first moon had passed, he strips her of every atom of property she owned. Overlooking everything else, there is an unbecoming precipitancy in the act which throws a flood of light upon the motives of Mitchell in marrying his stepdaughter. It could not have been affection; and when we find that instantly, upon being clothed with the authority of a husband, the deceived woman conveys to him all her estate, it is most natural to suppose that the solemnity of a marriage was resorted to as an instrument to procure the conveyance.

Such is my conclusion, and therefore I say, that unless some innocent third party be made to suffer wrong from which but for the conveyance such party would not have been subjected, the merits of the cause are with the defendants, upon the assumption that the exclusive purpose of the bill is to affect the property which originally belonged to Henrietta A. Bedford. To make that property responsible for the debts of Mitchell, contracted without any reference to it, and when his creditors,

relying upon the security afforded by it are not shown to have lost or abandoned any remedy or redress against him, would, in my judgment, be in opposition to the plainest principles of justice.

But the attempt here, is, in part at least, so to charge this property for the benefit of parties who certainly did not trust Mitchell upon the faith of the conveyance, and who are not shown by any proof in this cause to have lost or abandoned any remedy, which but for the conveyance they would have pursued. Mitchell, it appears by the proceedings, was the guardian of his daughter, Maria, who subsequently intermarried with the complainant, William W. McClellan, and as such guardian settled an account in the Orphans' Court of Baltimore county on the 18th of April, 1825, by which it appears there was due from him to his ward, a balance of $10,809 55. Afterwards, and after he had been removed from the guardianship, and after his former ward had attained the age of eighteen years, to wit, on the 12th of March, 1834, he passed what is called his fourth and final account, in which the former balance is brought forward, and charging interest upon that portion of it which consisted of cash, there is produced an aggregate of indebtedness amounting to $14,891 14, and he craves to be allowed, and is allowed by the Court, for property and money delivered and paid over to his ward, a credit for that amount, as "per release recorded appears;" thus upon the face of the record settling the whole claim, and discharging himself from liability.

It has been urged by the defendant's counsel, that, as upon the face of this account nothing appears to be due, and as complainants have produced it as a part of their evidence, they are concluded by it, and their bill for this reason must be dismissed. In this view I do not concur. The answer of the defendants admits very explicitly that the balance due from Mitchell to his ward was not in fact paid, but as stated in the answer, "that the release was given with the express motive of relieving her father, who was without property or the means of livelihood;" "and that it never was the purpose of the

said Maria (or her sister Elizabeth, his other daughter and ward, and who also released), to charge her father with the payment of said debt."

I, therefore, throw out of view the account passed in March, 1834, either as evidence of a claim on the part of the complainants against Richard B. Mitchell, the former guardian of the complainant, Maria (now Mrs. McClellan), or as proof of the payment of such claim. It cannot, in my opinion, be used against the defendants, because it is subsequent to the deed from Glenn, Kennedy, and Mitchell to Mrs. Bedford, bearing date the 2d of August, 1827, by which the property was reconveyed to her; nor can it be viewed as evidence of payment of the balance due from Mitchell to his ward, because the answer of the defendants concedes the contrary.

But in my opinion, the fact of indebtment of R. B. Mitchell to his former ward, Maria, is shown by the account passed in the Orphans' Court on the 18th of April, 1825; and I can see no good reason why in a proceeding to charge the property conveyed by Mitchell in trust to Messrs. Glenn and Kennedy, on the 25th of August of that year, the account may not be used as evidence of such indebtment. The point appears to me to be conclusively settled against the defendants, by the case of *Richards and Wife* vs. *Swann et al.*, 7 *Gill*, 367, in which it was held that accounts passed by a guardian in the Orphans' Court, in which he admitted himself to be indebted to his wards, were *prima facie* evidence of his indebtedness against the grantee of the guardian, claiming under a deed executed by him subsequent to the passage of the accounts. In that case the account was passed by the guardian in the Orphans' Court on the 27th of June, 1843, and the deed alleged to be fraudulent against creditors, was executed on the 15th of July, 1844; and upon a bill filed by the ward to vacate the deed as fraudulent against creditors, the account was admitted by the Chancellor, and by the Court of Appeals, as *prima facie* evidence of the indebtment of the grantor, and the deed was annulled. So far as this point is concerned, no distinction can be shown between that case and this; and the account,

therefore, of the 15th of April, 1825, must be received as *prima facie* evidence of the indebtment of Mitchell to his ward, Maria, in a proceeding to affect the property embraced in the deed of Mitchell to Kennedy and Glenn of the 25th of August following. It is quite as admissible as would be his note or bond, executed at the same time.

But the record further shows, that Maria, the former ward of Mitchell, attained the age of eighteen years on the 9th of March, 1834, and on the 12th day of the same month and year, she executed and acknowledged, in due form of law, a release, to the said Mitchell, which release was duly recorded in the office of the Register of Wills for Baltimore County, and a copy under seal is filed and is relied upon as a complete and full defence to the complainant's claim. The instrument in terms releases, exonerates, and discharges Mitchell, his heirs, executors, and administrators, from all and every action, suit, claim, and demand, which could or might possibly be brought, exhibited, or prosecuted against him, them, or any of them, for or on account of the money and property or the payment thereof, which by the last account settled in the Orphans' Court, appeared to be due from the said Mitchell to his former ward. And the question now to be considered is, whether under the circumstances of this case, the release is an answer to the bill which seeks to charge the property which originally belonged to Mrs. Bedford, and of which she was deprived by the improper means and instrumentalities before adverted to?

If it be conceded, as I think it must be, that the money appearing to be due from Mitchell to his daughter Maria, by the account in the Orphans' Court, was not in fact paid, and that her release consequently was gratuitous, it is equally clear that the deeds executed by his stepdaughter, Mrs. Bedford, by which her whole estate was conveyed to Mitchell, were likewise utterly destitute of consideration. The want of consideration is in truth apparent upon their face; and in addition to this, they were in my judgment executed under circumstances which lead strongly to the conclusion that imposition was practiced in obtaining them. There is not, in my opinion, the slightest ground

for supposing that the release from Mrs. McClellan to her father was procured by any undue influence exerted by him towards her. He ceased to be her guardian on the 29th of June, 1825, and the release was not executed until the 12th of March, 1834, nearly nine years afterwards; he in the interval having been indicted and convicted for having unlawfully married his stepdaughter, Miss Bedford. The release, therefore, though gratuitous, must be assumed to have been freely and voluntarily made, with full knowledge of all the circumstances, and a total exemption from any influence which could affect its validity.

In the case of *Fridge* vs. *The State*, 3 *G. & J.*, 104, it was decided that a female under the age of twenty-one cannot execute a release to her guardian, though she has capacity to receive payments from him at the age of sixteen; and the release in that case, which was executed on the 15th of July, 1824, and which the Court declared was manifestly prejudicial to the infant, was adjudged to be void. But since then the legislature has interposed, and by the 7th section of the Act of 1829, ch. 216, the releases of females of the age of eighteen years to their guardians, or to any executor, or administrator, are placed upon the same footing precisely as if such females were of the full age of twenty-one years. The language of the section is, "that from and after the passage of this Act, any receipt, acquittance, release, or final discharge, which shall be executed before the Orphans Court of the county where the estate shall have been settled, by a female of the age of eighteen years, to any guardian, executor, or administrator, shall have the same effect and operation in law in every respect, and to all intents and purposes, as if such female were of the full age of twenty-one." And by the provisions of the Act of 1831, ch. 305, similar releases, executed by females of the age of eighteen years, and acknowledged before a justice of the peace, are declared to have the same effect as if acknowledged before the Orphans Court. The release of the present Mrs. McClellan, to the former guardian Mitchell, was executed and acknowledged, in all respects, in conformity with the requirements of

these laws, she being at the time above the age of eighteen years.

It is said, to be sure, that these laws are inapplicable to the present case, because Mitchell, at the date of the release, was not the guardian of his daughter, Maria, he having been removed in 1825, and another guardian appointed in his place, the argument being that releases made by females of the age of eighteen, are not effectual except when made to their guardians. The answer to this is that, by the express terms of the 6th section of the Act of 1829, ch. 216, the guardianship ceases when the female ward attains the age of eighteen years, and, consequently, if a release is only good when made to a person *then*, at its date, filling the office of guardian, the 7th section could have no operation whatever, because it would, upon that construction, provide for the execution of a release to a guardian when there could be none. It is clear the legislature intended that the release spoken of should be a release executed to him *who had been* the guardian, but whose office had ceased by the arrival of the female ward to the age of eighteen years. But if there could be any doubt upon this subject, it would be removed by the 4th section of the act of 1831, ch. 305, which, in speaking of these releases, gives validity to such as are executed to any executor, administrator, or guardian, "*or person who has been such.*"

I think, therefore, there can be no doubt whatever that we are to deal with this release, executed by the present Mrs. McClellan to her former guardian, she being then of the requisite age, as if she had been at the full age of twenty-one years. Indeed, there can be no doubt upon the subject, because such is the plainly declared will of the legislature. The authorities which speak of the suspicion and jealousy with which the Courts view transactions between guardian and ward, and others occupying fiduciary relations, immediately after such relations are dissolved, and before the influences which usually result from them may be supposed to have passed away, do not apply here, because the relation had terminated nearly nine years before this release was executed. It must be taken, therefore, as an advised, unbiassed, and voluntary renunciation

on the part of the female complainant, before her intermarriage with the other complainant, of her claim against her former guardian, made at a time when she was as competent to perform the act as if she had been of the full age of twenty-one years. Viewed in this light, and I can view it in none other, and I cannot bring myself to believe she can now repudiate that act, and especially I think she cannot be permitted to do so, as against Mrs. Bedford, who, by the conveyances set out in the proceedings, has been restored to the property which originally belonged to her, and of which I think it very clear she was unfairly deprived.

Mrs. Bedford was not a party to the deed of trust executed by Richard Bennet Mitchell to Messrs. Kennedy and Glenn on the 25th of August, 1825. She neither united in the execution, or acknowledged it, and therefore cannot be bound or affected by any of its provisions or trusts. One of the trusts of that deed was "to secure and insure the payment of all sums of money now or that may hereafter be due, owing, or payable to Elizabeth Mitchell or Maria Mitchell, from the said Richard Bennet Mitchell as their guardian;" the surplus, after paying the debts intended to be secured, being reserved to the grantor, Mitchell. But though Mrs. Bedford was no party to this deed, and upon no principle can be affected by it, yet it is said that in the conveyance of Kennedy, Glenn, and Mitchell to her, of the 2d of August, 1847, there is an express stipulation that she "is willing and hath agreed to pay and satisfy all and singular the debts due by the said Richard Bennet Mitchell, and intended to be secured and paid by and from the said trust fund," and that she hath paid, &c. This last statement, it is correctly said, is inconsistent with the fact, and it is urged that whatever may be said of the conveyance of Mrs. Bedford to Mitchell of March, 1825, or of his conveyance to Kennedy and Glenn of the August following; yet here is an express engagement on her part made when the influence of Mitchell over her was at an end, to pay this debt to Mrs. McClellan, and hence it is insisted, the property included in the conveyance is bound for the claim. And it is further urged on the part of the complainants, that Mrs. Bedford, by her deed to

John Hillen, of the 18th of October, 1827, again recognised the existence of this debt, and the liability of the property for its payment.

It must be borne in mind, however, that these conveyances, both of them, were executed long before the present Mrs. McClellan executed her release of March, 1834, and it would be manifestly unjust to hold Mrs. Bedford bound by the stipulations of those deeds, and relieve Mrs. McClellan from the operation of her release to her former guardian. In my opinion, there not only is no good reason why Mrs. Bedford should be held liable upon the stipulations of these deeds, and Mrs. McClellan discharged from the effect of her release, but if any discrimination must be made, it should be in favor of the former, and not the latter. Mrs. Bedford had been stripped of all her property under circumstances of foul wrong and imposition, and it is not difficult to suppose she would submit to almost any terms to recover some portion of it. Messrs. Kennedy and Glenn, having a due and proper regard for their own safety, could not have reconveyed the property to her upon any materially different terms. And Mr. Hillen, having become her surety, was compelled to take a deed which would protect him from danger. Situated thus, we may well understand the considerations which induced Mrs. Bedford to take the deed from Kennedy, Glenn, and Mitchell, and to give the deed to Hillen.

But Mrs. McClellan, in executing the release to her father, on the 12th of March, 1834, was subject to no such influences. She was of competent age. His guardianship had terminated nearly nine years previously, and there was nothing in their relative position at that time which can excite the slightest suspicion that, in releasing him, she was not acting with entire and absolute freedom of will, and with full knowledge of what she was doing.

I hold it, therefore, to be clear, that so long as that release stands, Mrs. McClellan and her husband, the present complainants, cannot be permitted to recover against Mrs. Bedford and those who claim under her, because, by any previous act or covenant on her part, she may have consented that the

property which originally belonged to her should be responsible for the debts of Mitchell.

But the complainants have filed, under the commission, the transcript of the record of a suit instituted in this Court in the year 1838, by the present complainants, against Richard Bennet Mitchell alone, in which that release was impeached, and, by the decree of the Chancellor, set aside, in the year 1840. The admissibility of this record is excepted to upon several grounds, and amongst others, upon the ground that the excepting defendants were not parties to the cause in which the decree was pronounced, and I have no doubt the exception is well taken. It seems to me it would be a most pernicious doctrine to establish that the decree passed in that cause, to which Mrs. Bedford and the other excepting defendants were not parties, should be received in evidence against them. If that bill was filed for the purpose of removing this release out of the way, and subjecting by such removal the property of Mrs. Bedford, to the claim of the complainants against Mitchell, then it was essentially necessary that she and the other parties whose interests are associated with hers, should have been made parties. The decree otherwise would have been fraudulent and void as to them, and of course can have no operation whatever as against them. *Story's Eq. Pl., sec.* 427.

Upon the whole, then, and without expressing any opinion as to the effect of the plea of the act of limitations, I am prepared to sign a decree dismissing the bill so far as it proposes to affect the property which originally belonged to *Henrietta A. Bedford*, and which became vested, by the conveyances mentioned in the proceedings, in Kennedy and Glenn. Different considerations may apply to such property (if there be any) as belonged to Richard Bennet Mitchell not derived from the said Henrietta A. Bedford, and as to such property no opinion is now expressed.

Nelson, for Complainants.
Wallis, for Defendants.

RICHARD H. JACKSON,
vs.
BENJ. D. DASHIEL & JAMES L. COLSTON. } DECEMBER TERM, 1852.

[LIMITATION OVER AFTER FAILURE OF ISSUE.]

A TESTATRIX devised certain real estate to her daughter for life, remainder in fee to her three grandsons, naming them, "provided, nevertheless, that if either or any of my said grandsons *should die without issue*, then" the property "to descend to, and become the estate of the *survivor or survivors*." One of the devisees in remainder died without issue. HELD— That the limitation over to the survivors is too remote, being after an indefinite failure of issue.

The words "*without issue*," in a will, when applied to dispositions of real estate, mean *ex vi termini*, an indefinite failure of issue, if there is nothing in the will restricting their operation; and the circumstance that the limitation over is to a survivor in fee for life, will not have the effect to restrain the established legal meaning of the words.

[The clause of the will construed by the Chancellor in this case, is set out in his opinion.]

THE CHANCELLOR:

In the will of Hannah Douglass, executed and proved in the year 1832, is the following clause, and upon the legal effect of which, the question submitted by agreement of parties depends.

"I give and bequeath unto my daughter, Mary Dashiel, the house and lot in which I at present reside, and which was purchased from Robert Hart, and also one-third part of the lot adjoining, which was purchased of Thomas C. Smith, for and during the term of her natural life; and at her death, the said house and lot, and one-third part of the adjoining lot, as above bequeathed, to be equally divided, share and share alike, between my three grandsons, Richard Henry Jackson, George Minor Colston, and Benjamin Douglass Dashiel, to them and their heirs for ever, provided, nevertheless, that if either or any of my said grandsons *should die without issue*, then the

above bequest to descend to and become the estate of the survivor or survivors."

Upon the death of the devisee, Mary Dashiel, a bill was filed by Richard Henry Jackson, one of the devisees in remainder, against Benjamin Douglass Dashiel and James H. Colston, the heir-at-law of George Minor Colston, another of the devisees in remainder, who had likewise died, for a sale of the property for the purpose of partition; and the same having been sold, the proceeds are now to be distributed; and the question submitted is, whether the limitation over to the survivors, Richard Henry Jackson and Benjamin Douglass Dashiel, is good, and can take effect as an executory devise, George Minor Colston, having died without issue, leaving a brother of the whole blood, his heir-at-law.

In my opinion, this can scarcely be considered an open question, since the decision of the Court of Appeals in the case of *Newton* vs. *Griffith*, 1 *H. & G.*, 111. It was there held upon great consideration, that the words "without issue" in a will, when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there is nothing in the will restraining the operation of the words; and that the circumstance that the limitation over is to a survivor either in fee or for life, will not have the effect to restrain the established legal meaning of the words. It follows, therefore, that the limitation over to the devisees, Jackson and Dashiel, in this case, is too remote, being after an indefinite failure of issue, and that the share of Colston, the deceased devisee, upon his death descended upon and vested in his heir-at-law, the defendant, James H. Colston, to whom his share of the proceeds of the property must be awarded.

B. D. JACKSON, for Complainant.

S. D. LECOMPTE, for Colston.

JOSEPH J. GAMBRIL AND OTHERS,
vs.
RICHARD GAMBRIL AND OTHERS.

March Term, 1853.

[ALLOWANCE TO TENANT FOR LIFE FOR IMPROVEMENTS.]

Where a tenant for life puts improvements upon property for the mutual accommodation of himself and those entitled in remainder, and the property is sold to promote the interests of all parties interested, he will be allowed the value of such improvements out of the proceeds of sale.

Though a mortgagee or a tenant in possession may not in all cases be allowed for new improvements, yet a party thinking himself absolutely entitled, who has expended considerable sums in repairs and lasting improvements, will be allowed for such expenditures.

The amount of the proceeds to be allowed a tenant for life for his interest in the property sold, depends upon his age and state of health at the time of sale.

[In this case, certain real estate was conveyed to a trustee; *in trust*, for the benefit of Richard Gambril for life, and after his death, for the benefit of his wife, in case she should survive him, during widowhood; and after her death or marriage, for the benefit of their child or children, and their heirs and assigns. It was proved that at the date of this deed, the dwelling-house on this farm was a small log-house, in a dilapidated condition, and an unhealthy location. That Richard Gambril, the tenant for life, lived in it until it became unfit for him and his children to remain in any longer, when he erected a new house, not more expensive in cost than was necessary for the comfort of his family, and that every economy was used in erecting said building, and that at this time it is worth more than $3,000. Upon a bill filed by the infant, *cestui que trusts*, in remainder, alleging that it would be for the interest and advantage of all parties interested, that the property should be sold for the purpose of partition amongst them, according to their respective interests; a decree for that purpose was passed by the Chancellor, and the proceeds being distributed by the Auditor's accounts, certain exceptions

were taken to said accounts by Richard Gambril, the tenant for life, the nature of which sufficiently appears from the following opinion of the Chancellor, pronounced on the hearing of said exceptions.]

THE CHANCELLOR:

This case is submitted upon the exceptions of Richard Gambril to the Auditor's account C, accompanying his report of the 27th of January last.

The case, in its circumstances, is not precisely like that of *Bright* vs. *Boyd*, 1 *Story's Rep.*, 478, cited with approbation by the Court of Appeals in *Jones' Admr. of Hawkins* vs. *Jones*, 4 *Gill*, 87. But though the facts are dissimilar, the views expressed by the Court in both cases apply with much force to the question raised by the first exception in this case.

The principle settled by the Court of Appeals in *Jones* vs. *Jones* appears to be this: that though a mortgagee in possession, or a tenant for life, may not in all cases be allowed for new improvements, yet a party, thinking himself absolutely entitled, who has expended considerable sums in repairs, and lasting improvements, will be allowed for such expenditures. The Court did not mean to decide against the right of the mortgagee, or tenant for life, to be allowed for reasonable and permanent improvement, as well as repairs; but that, conceding such to be the rule still, a party entertaining the *bonâ fide* impression that he was the true and absolute owner, and expending money under that impression in improvements, as well as repairs, would, when called upon to account, be permitted to recover the amount so expended, from the rents and profits.

This, however, is not a case in which a mortgagee in possession, or tenant for life, is called on to account; nor is it a case in which a party supposing himself to be entitled to the estate has made improvements and repairs, and now when he finds he was mistaken as to the title, and the property and its profits are demanded of him, asks to be allowed for the sums so expended. It is a case in which the rights of the parties to the

estate sold were clearly known. It was sold to promote the interests of all; and the question presented is, what allowance shall be made to the tenant for life out of the proceeds of the sale, for improvements put by him upon the property for the mutual accommodation of himself and the parties entitled in remainder?

The proof returned on the 6th of January last clearly shows the propriety, not to say necessity, of making the improvement; and though there is no evidence of the actual amount expended by Richard Gambril, yet its value at this time is shown to exceed three thousand dollars. And this is the amount which the Auditor has allowed Mr. Gambril in his account D. This allowance, I think, is warranted by the case of *Hibbert* vs. *Cooke*, 1 *Simons & Stewart*, 552, and is not at all in conflict with the case of *Jones* vs. *Jones*, or the case in 1 *Story's Rep.*, 478; but on the contrary, the allowance derives support from the views expressed by the Courts in those cases. There can be no doubt, from the proof, that it was for the benefit of all parties concerned that the house should be built; nay, it may with truth be said, that it was absolutely necessary for their comfort and safety that it should be, and inasmuch as the parties entitled in remainder participated with the tenant for life in the enjoyment of the improvement, the justice of making the allowance appears to be perfectly manifest. I am, therefore, of opinion, that the first exception of Richard Gambril to the account C, is well taken, and must be ruled good.

The second exception is directed against the sum allowed the said Gambril in lieu of his life estate, which it is urged is inadequate. In the accounts A, and B, accompanying the first report of the Auditor, Mr. Gambril is allowed the third of the net proceeds in lieu of his life interest in the property sold; whilst in the last account, he is allowed three-eighths. The Chancellor does not understand why this discrepancy exists in the two sets of accounts, and for this reason could not, without explanation, proceed to confirm any one of them. But there is another reason which would forbid an immediate order of

confirmation. The Auditor reports that none of the witnesses speak of the health of Richard Gambril as of the day of sale, the period to which the proof should be directed; and no proof has been taken in reference to the health of his wife, to whom an allowance is made for the value of her contingent life interest. Now, inasmuch as the amount of each of these allowances depends upon the age and state of health of the parties at the time of the sale, the case must go back to the Auditor, that the necessary evidence may be supplied.

R. J. BRENT, for the Exceptants.
A. H. GAMBRIL, for the other parties.

AUGUSTA HITCH
vs.
JACOB G. DAVIS, AND OTHERS.

MARCH TERM, 1853.

[POWER OF THE COURT TO DECREE DEVISES UNDER ACT OF 1831, CH. 311.]

IT is not necessary that the party who applies to this Court to order a demise under the 5th section of the Act of 1831, ch. 311, should be the tenant in possession: the tenant of any particular estate, of full age, whether in possession or not, may apply under that section.

But the Court is not at liberty to order a demise under that act, unless it is made to appear affirmatively that the interest and advantage of all parties would be promoted by it.

A testator devised land, *in trust*, for his daughter for life, remainder to his granddaughter, the complainant, for life, remainder to the lawful issue of such granddaughter, in fee, if any such be living at the time of her death, but if none, then remainder to his daughter, M. D., for life, remainder in fee to her son, S. B. D. Upon a bill by the complainant, under the Act of 1831, ch. 311, to have the land leased, it appearing by the proof that those who might be ultimately entitled in remainder would be injured by such lease, the bill was dismissed.

[Solomon Betts devised by his will his country-place, containing about fifty acres, situated within the limits of the city

of Baltimore, to his wife and Jacob G. Davis, *in trust* for the separate use of his daughter, Sarah Hitch, during her natural life, and after her death then for the separate use of his granddaughter, Augusta Hitch, daughter of the said Sarah, during her natural life, and after her death for the use and behoof of the lawful issue of the said Augusta, and for the heirs and assigns of such issue for ever, if any child or descendant of hers there be living at the time of her decease, and if none, then to hold all said estate, property, and stock in trust for the separate use of his daughter, Mary Davis, during her natural life, and after her death then in trust as to the aforesaid country-place for the use of his grandson Solomon Betts Davis, his heirs and assigns for ever. On the 4th of June, 1851, Augusta Hitch, during the life of her mother, Sarah Hitch, filed her bill asking the Court to have this land demised, as stated in the following opinion of the Chancellor, which also contains a full statement of the defence relied on in the answers of the defendants and of the proofs in the cause.]

THE CHANCELLOR:

This bill is founded upon the provisions of the Act of 1831, ch. 311, and it is supposed, and I think correctly, that the 5th section of the Act applies to the circumstances of the case, and would authorize the Court in decreeing the relief prayed, if by the pleadings and proofs it appeared that it would be for the interest and advantage of the parties to do so.

I do not concur in the view taken by the counsel for Mrs. Davis and Solomon B. Davis, that the party who applies to the Court to order a demise under this section of the law, must be the tenant in possession. The language of this section is: "That the Chancellor, or County Court aforesaid, shall have the same authority to decree a demise, or demises, under the rules and regulations as aforesaid, where the tenant of the particular estate for life, or for years, or for other estate, shall be of full age, and shall pray for such decree." The effect of the section is to authorize the tenant of any particular estate, of full age, whether in possession or not, to apply to the Court,

and therefore this complainant, though her estate does not vest in possession until the death of her mother, Mrs. Sarah Hitch, has a standing to file the bill.

But I apprehend that, looking to the entire law, the Court is not at liberty to order a demise, unless it is made to appear affirmatively that the interest and advantage of all parties concerned, would be promoted by it, and such appears to have been the view of the solicitor, by whom the bill in this case was framed; the allegation being "that the said fifty acres," (the land proposed to be leased), "are at this time not as productive as they might be made, if they could be demised after the usual manner in the City of Baltimore, for terms looking to the creation of permanent ground-rents, which would be for the interest of all parties."

But the defendants, Jacob G. Davis and wife, and Solomon B. Davis, to whom the ultimate remainder is limited, whilst admitting that the property might be made more productive than it is now by proper cultivation, or by being leased on permanent leases, insist that should they ever become entitled to said property, these permanent leases at the present low prices of land, would be seriously injurious to them; and hence they deny the power of the Court to grant the prayer of the bill.

The proof in the cause sustains the theory of the answers, and shows most conclusively, that whilst the parties now in the possession and enjoyment of the property would be benefited by leasing it permanently, those to whom, under the will of Solomon Bates, it may ultimately pass, would, should that event happen, be materially injured, should it now be placed on permanent leases.

It is very true that, under the provisions of the will, neither Mrs. Davis nor her son, Solomon B. Davis, may ever have any interest in the property. This depends upon the death of Augusta Hitch, the complainant, without leaving issue living at that time. But should she so die, the limitations over to Mrs. Davis, and Solomon B. Davis, will take effect, and consequently, they are interested in the disposition which may be now made of the property; and the evidence clearly shows

that their interest is antagonistic to those who make the application to the Court. Under these circumstances, I do not see how the prayer of the bill can be granted.

The reference to the Acts of 1816, ch. 154, and 1818, ch. 193, and the incorporation of their provisions into the Act of 1831, under which the bill is filed, in my judgment, deny to the Court the power to demise permanently property situated as this is, when from the evidence it appears that though the interest of some of those in whom the title resides, will be promoted, the rights of others in the same property will be injured. It would, in my opinion, have been a stretch of authority in the legislature, to authorize the disposition of the property, in which several were concerned, upon the ground that some would be benefited, whilst others would be damnified; and I am aware of no law by which they have ever attempted to do so. By the 12th section of the Act of 1785, ch. 72, which authorizes the Court to direct the sale of lands in which, from infancy, or other incapacity, some of the joint owners are unable to agree, it is carefully provided that the power shall only be exercised upon its appearing that it will be for the interest and advantage of all parties, and I am not aware of any law in which a provision so manifestly just has been omitted.

It is to be regretted, certainly, that this conflict of interest should exist, but when it does exist, why should the law interpose to benefit one owner at the expense of another? I shall, therefore, dismiss the bill in this case, but as it is one of the first impression, and is not without equitable circumstances, it will be without costs.

LATROBE, for Complainant.
PRATT, for Respondents.

SARAH HITCH, BY HER NEXT FRIEND,
vs.
JACOB G. DAVIS, AND OTHERS.

March Term, 1851.

[DONATIO INTER VIVOS, OR MORTIS CAUSA—CHANCERY PLEADING AND PRACTICE.]

It is essential to the validity of both a *donatio inter vivos* and a *donatio mortis causa*, that there should be a *delivery* according to the manner in which the particular thing, the subject of the gift, is susceptible of being delivered; but this delivery need not be proved by witnesses who actually saw it done, but it may be inferred from facts and circumstances.

The donor must part with the legal power and dominion over the subject of the gift; if he retains the dominion, and if there remains to him a *locus penitentiæ*, there cannot be a perfect and legal donation, and that which is not a good and valid gift at law, cannot be made good in equity.

A promissory note, payable to the order of the testator, which was never endorsed by him, but which he retained during his life, and after his death was found in possession of his executor, was claimed by his daughter, as a gift, upon the ground that he had given it to her, but had retained it in his possession as her agent, to collect the interest thereon for her, which he regularly paid over to her during his life. Held—that whatever may have been the *intention* of the testator, he had not *executed* it in the mode recognised by law to the perfection of a parol gift, not having parted with his legal power and dominion of the subject of the gift, which is therefore void in law, and equity will not make it good.

The Court cannot, under the general prayer, grant relief not warranted by the allegations of the bill; the relief under the general prayer must be consistent with the case made by the bill, and its extent and character depends upon the facts charged in the bill.

A bill charged an executor and trustee with, 1st, neglect to pay rents and profits; 2d, failure to invest a $5,000 legacy; and 3d, refusal to deliver to complainant a certain note claimed by her as a gift from the testator. The relief prayed, was an account and payment of the legacy, and rents and profits, delivery up of the note, and if assets were not admitted, an account thereof, and their application, in due course of administration, and for *general relief*. Held—that under this bill, the defendant could not be charged as executor with the note, as assets for the payment of the legacies of the will, exceptions having been filed to the sufficiency of the averments of the bill in this particular.

The bill, so far as it sought recovery for the note, was dismissed in May, 1851, but retained as to other matters; and in February, 1852, the cause was sent to the Auditor, for an account as to such other matters. Held—that the Court cannot order an amendment, so as to present the question of the applicability of the note as assets.

Where no time is fixed by the will for the payment of a legacy, it will bear interest from the expiration of one year after the death of the testator.

[The allegations of the bill and answer, and the facts of this case, will be found fully stated in the following opinions of the Chancellor.]

THE CHANCELLOR:

In the case of *Pennington, Adm'r of Patterson* vs. *James C. Gittings, Executor of James Gittings*, 2 *G. & J.*, 208, one of the questions raised and discussed in this case was examined and decided by the Court of Appeals, and upon the principles there settled, this case, so far as the same question is concerned, must depend.

It was there decided that neither a *donatio inter vivos* or a *donatio mortis causa* by mere parol was effectual. That in either case *a delivery* of the thing intended to be given was essential to the perfection of the gift, and that this *delivery* must be according to the manner in which the particular thing, the subject of the gift, is susceptible of being delivered; that there must be a parting by the donor with the legal power and dominion over it. If he retains the dominion—if there remain to him a *locus penitentiæ* (which must be the case when he retains the possession, and what is done is merely by parol), there cannot be a perfect and legal donation; and that which is not a good and valid gift at law cannot be made good in equity.

In that case, the subject of the supposed gift was seventy-five shares of stock in the Commercial and Farmers' Bank of Baltimore, and the allegation of the bill (which allegation was assumed by the Court to be established by the proof) was, that the testator of the defendant gave and handed to the complainant's intestate the certificate of the stock, entitling the holder thereof to the number of shares mentioned in it, at that time and in her presence endorsing his name on said certificate, informing her (she being his daughter) that he gave her the same to supply the loss of certain ground-rents which he had previously given her.

It was insisted in that case, that by the delivery of the cer-

tificate, endorsed by the alleged donor, a power was given to the donee to write over the name of the former a full assignment or power of attorney, which would have authorized the latter to cause a transfer to be made upon the books of the Bank. But this, the Court said, made no difference, because, assuming that the delivery and endorsement of the certificate gave the authority claimed, it never was executed, and as it appeared upon the face of the certificate that the stock was transferable at the Bank only, and that the endorsement, whether in blank or in full, did not and could not operate as a transfer, the gift was incomplete, both at law and in equity, for want of delivery. The stock, the subject of the supposed gift, could only be delivered by a transfer on the books, and that not having been done, though authority to do so may have been given to the alleged donee, the donor had not parted with the legal power and dominion over it, and as no valuable consideration passed, neither he, if living, nor his executor after his death, could be compelled to make the transfer.

That case, I apprehend, is entirely decisive of this, so far as the note of Mr. Rogers is concerned, which is claimed by Mrs. Hitch as a gift from her father, Solomon Betts. There is certainly no pretence for saying that there was an *actual delivery* of this note to Mrs. Hitch. The allegation of the bill is, that he (Solomon Betts), took the note of the said Lloyd N. Rogers for a piece of land sold by him to Rogers; that during his lifetime he regularly paid his said daughter, Sarah Hitch, the interest that accrued thereon from time to time; "that he gave her said note, but retained it in his possession as her agent to collect the interest thereon for her."

The note then never passed from the possession of Mr. Betts, nor can it be said, with any propriety, that he parted with his legal power and dominion over it, leaving nothing to be done by him or his executors to perfect the title of his daughter. A note like this, payable to order, could not pass by delivery merely, as would bank notes or promissory notes, payable to bearer, because, in the case of a note payable to

order, the delivery, without endorsement, would not authorize the party receiving it to sue in his own name, so that the gift of the money, the thing intended to be given, would be incomplete, and the action, if one is brought for its recovery, would have to be brought in the name of the payee, or his executor, if he be dead. *Bradley and Wife* vs. *Hunt, Adm'r of Jack*, 5 *G. & J.*, 54.

The case of *Grangiac* vs. *Arden*, 10 *Johns. Rep.*, 302, relied upon by the plaintiff's counsel in support of the gift, does not, I think, establish the point for which it was cited. In that case, which was an action at law for money received by the defendant upon a lottery-ticket, alleged to have been given by a father to his daughter, who was at the time about eight years old, the jury upon the evidence of the declarations of the father, inferred a delivery, and the Court said that these declarations and acknowledgments afforded reasonable grounds for the jury to infer, that all the formality necessary to make a valid gift had been complied with, and the right and title of the plaintiff to the money complete and vested. That delivery of possession is necessary to constitute a valid gift, was most clearly and distinctly affirmed by the Court, and the verdict of the jury was permitted to stand, because facts and circumstances had been proved, upon which the jury might and did infer such delivery. The case of *Isaac* vs. *Williams*, 3 *Gill*, 278, simply proves that in the case of a parol gift of negroes, the delivery of possession need not be proved by a witness who saw it, but that like other facts, it may be proved by inferential testimony.

And in the case before the Court now, it is not meant to be said, that the plaintiff can make out title to the note in question only by a witness who saw the possession delivered. If the facts and circumstances of this case were sufficiently strong to create a fair and reasonable presumption that Mr. Betts, having endorsed his name upon this note, actually delivered it to his daughter as a gift, her title to hold it, it is believed, could not be disputed; but it is clear, he did no such thing. On the contrary, the bill alleges, and the proof clearly shows, he retained the possession during his lifetime, and upon his

death, it is found in the hands of his executor, or of a party to whom he assigned it, though the precise time when it came to the possession of the executor does not plainly appear.

His paying the interest to his daughter during his life, is certainly a circumstance to show that in selling the land, he did not intend to take from her altogether the benefit she and her husband had previously enjoyed, from the privilege of cutting wood upon it; but it is not evidence, or at all events, it is far from being conclusive evidence, that he had given her the principal since due on the note. Indeed, looking to the whole evidence, I think the inference might fairly be drawn, that he did not intend to give her the principal, and that the gift was confined to the interest. Such is my construction of the evidence of Mr. Rogers, who, in explaining what he meant by the words used in his examination in chief, that "the whole belonged to her," said, that his impression derived from conversations with Mr. Betts was, that as he intended to give the property to his daughter (meaning the land sold to Mr. Rogers), he had devoted the *interest* of the proceeds to her use, and considered it as hers.

That Mr. Betts did not intend to give this note absolutely to his daughter, may be fairly inferred from the provisions of his will. All that she takes under the will, is placed in the hands of trustees for her separate use, free from the power, control, or disposal of her then or any future husband; and not only so, the property thus secured to her separate use, by the will, is for her *life only*, with limitations over to other uses, as in the will is provided. She then, under the will, takes nothing absolutely, her interest being limited to her separate use for life, with remainder to others. Now, it is not at all likely that Mr. Betts, whilst carefully guarding the devises and bequests to his daughter from the danger which he apprehended might result from the improvidence of others, and whilst he thus limited her interest in the property given by his will to her use for life only, would make an out and out gift of upwards of $2,500, thus placing so much of his estate, by a gift in his lifetime, exposed to perils and contingencies against which he so studiously protected the property

given by his will. Such, I say, is highly improbable. But whatever he intended to do, and conceding that I am mistaken in regard to his *intention*, I think it very clear he has not *executed* his intention in the mode required by law, to the perfection of a parol gift. That is, that he did not part with his legal power and dominion over the subject of the gift, and therefore that it is void in law and equity, will not make it good. There can, then, be no recovery, so far as the note of Mr. Rogers is concerned.

The bill, however, embraces other subjects, and with reference to these, the proceedings have become defective, in consequence of the discharge of Jacob G. Davis, a trustee under the will of Mr. Betts, and the appointment of another trustee in his place.

Before an account of these subjects can be taken, they being within the trusts of the will, it is indispensable that the new trustee should be made a party, which has not been done, and the case, therefore, as to them, will be allowed to stand over, with liberty to the complainant, by proper proceedings, to bring the new trustee before the Court.

[The Chancellor accordingly passed an order, dated the 9th of May, 1851, dismissing the bill, "so far as it seeks to recover from the defendant, Jacob G. Davis, for or in respect of the note of Lloyd N. Rogers to Solomon Betts, for the sum of $2,673 75, dated the 17th of November, 1838, in the proceedings mentioned," but "that the said bill in all other respects be retained, with liberty to the complainant, by proper proceedings, to bring before the Court, as a party, William George Krebs, the trustee appointed in the place of Jacob G. Davis, one of the defendants, to execute the trusts of the will of Solomon Betts, deceased. And it is further adjudged, ordered, and decreed, that the question of costs be reserved for further order." A supplemental bill was then filed, making the said Krebs a party, and he having answered, the cause was, with regard to the questions left open by the decree of May, 1851, sent to the Auditor for an account, from the

pleadings and proofs then in the cause, and such further proofs as the parties might lay before him. The complainant excepted to the report and accounts of the Auditor, made in obedience to this order, upon certain grounds, which sufficiently appear from the following opinion of the Chancellor, delivered at the hearing thereof.]

THE CHANCELLOR:

This cause now comes up on exceptions to the Auditor's report, made in pursuance of the order of the 9th of February, 1852, and the principal question raised by the exceptions, and discussed at the bar, relates to the liability of the defendant Davis, as executor of Solomon Betts, to account for the note of Lloyd N. Rogers, for $2,673 75, which matured and was paid by the latter at the Chesapeake Bank, on the 20th of November, 1843.

The original bill, which was filed in this cause in Baltimore County Court, on the 13th of February, 1851, embraced and sought to charge the defendant Davis, in respect of three several items of claims, two of which were founded upon provisions in the will of Solomon Betts, and one upon the ground of a parol gift, alleged to have been made by him in his lifetime, to his daughter, the complainant Sarah, of the note of Mr. Rogers.

The bill alleged, and the will of Mr. Betts proved, that he devised a portion of his real estate to his said daughter, in trust for her use during her life, and that he also directed the sum of $5,000 to be invested in stock for her use, during the same period, and that the defendant Davis, who was named one of the executors and trustees, became by the renunciation of the parties associated with him in the trust, the sole executor and trustee.

And the bill further charged, that the testator was in his lifetime seized of a lot of ground, lying contiguous to the real estate which he so devised to his daughter in trust for life, which lot of ground he had given to her, though no deed had been executed therefor; and that with her consent, he sold

the same to Mr. Rogers, taking his note therefor, which note, though retained by the testator, she alleged he gave to her, and always, during his lifetime, paid her the interest which accrued thereon.

And the title to this note constituted the third ground of claim presented by the bill, which charged the defendant Davis with having neglected to pay the complainant the rents and profits of the real estate so devised to her, with a failure to make the investment of the $5,000, or to pay her the interest thereon, and likewise with refusing to deliver her the note of Mr. Rogers, or to pay her the money due thereon. And the bill prayed that the defendant, Davis, might be compelled to account for said legacy, principal and interest, for the rents and profits of the real estate, and that he should be decreed to deliver up for her use, the note in question, and pay the interest which had accrued thereon, and had been received by him, and that if the defendant shall not admit assets sufficient to pay the said $5,000 legacy, that then an account may be taken of the estate and effects of the testator, and the same applied in due course of administration, and for general relief.

The answer of the defendant, Davis, insists that he has duly and regularly paid to the complainant all the rents she was entitled to, and that he has invested, according to the directions of the will of the testator, all and every sum of money belonging to his personal estate, which the complainant was entitled to have invested for her benefit; and with regard to the note of Rogers, the answer, by way of plea, sets up a proceeding in the Orphans' Court, in which, as the plea avers, an adjudication was made, that said note was the property of the defendant himself.

The cause came on first, to be heard in May, 1851, when, for the reasons then stated, it was decided that the title of the complainant, Mrs. Hitch, to the note in question, could not be maintained, either as a *donatio inter vivos*, or *mortis causa*, and consequently the bill, so far as it sought to recover from the defendant, for or in respect of said note, was dismissed, but in other respects was retained, with liberty to the complainant, by proper proceedings, to make a new party, which

had become necessary, by the appointment of a trustee in the place of Davis. This was done, and by an order passed on the 9th of February, 1852, the cause, with regard to the questions left open by the decree of May, 1851, was sent to the Auditor for an account from the pleadings and proofs then in the cause, and such further proofs as the parties might lay before him.

This has been done, and in the account C, stated under instructions from the solicitor of the complainant, the defendant, Davis, as executor of Solomon Betts, has been charged with the note referred to, with interest from the 20th of November, 1843, when it was said, and as before observed, the propriety of so charging him is the only question of importance presented by the exceptions which have been argued.

In addition to the exception filed by Mr. Davis to the account C, he has filed an exception to the sufficiency of the averments of the original and supplemental bill, to enable the complainant to recover for the note of Rogers; and it seems to me very clear, that the bills contain no averment which will justify the Court in granting relief in the form in which it is now proposed to charge the defendant, with respect to this note, upon any prayer in the bill, general or special.

The object of the supplemental bill was simply to bring in the new party, and contains no averments, except that which was necessary to accomplish the purpose in view. And with reference to this note of Mr. Rogers, the original bill, by its averments and prayer, claimed it as the property of Mrs. Hitch, by virtue of a parol gift of it to her, by her father, in his lifetime. The question, and the only question which was or could have been raised upon that bill, was, whether the note was her property or not. The idea that it was to be regarded or treated as assets in the hands of the defendant, as executor of Mr. Betts, was wholly repudiated, and a decree founded upon the hypothesis, that it was an asset, would have been repugnant to the very letter and theory of the bill, and the specific prayer for relief.

It is well settled upon the authority of numerous cases, that

the Court cannot under the general prayer grant relief, which is not warranted by the allegations of the bill. The limitation upon the power of the Court to grant relief under the general prayer, is, that it must be agreeable to the case made by the bill, and not be different from or inconsistent with it, 6 *H. & J.*, 29. The extent and character of the relief which may be granted under the general prayer, depends upon the facts charged in the bill, 6 *G. & J.*, 152. "If," say the Court of Appeals, in *Gibson* vs. *M'Cormick*, 10 *G. & J.*, 108, "the complainant cannot obtain the specific relief for which he prays, he may obtain any relief consistent therewith, warranted by the allegations of his bill, provided it contains a prayer for general relief."

The averments of this bill being excepted to, according to the provisions of the 5th section of the Act of 1832, ch. 302, relief cannot be granted upon the ground, that the *proof* in the cause (if there be such proof) entitles the complainant to the relief which the Court is now called upon to grant. The cause stands, and the title of the complainant to the relief she now asks for depends, upon the principles of Chancery pleading as they existed prior to the passage of the Act of Assembly; and according to these, as is too clear for controversy, the plaintiff, when she claims under the general prayer, must show allegations in her bill which will entitle her to it. But, as is equally clear, the relief she now asks under the general prayer is inconsistent alike with the averments of her bill and the specific relief therein prayed.

It is very plain, then, as I think, that in the existing condition of the pleadings, the complainant could not be permitted to charge the defendant Davis, as the executor of Solomon Betts, with this note of Lloyd N. Rogers, treating it as an asset in his hands for the payment of the pecuniary legacies bequeathed by the testator. And in this state of the case it becomes important to inquire, whether the Court would have the power, upon application, to order an amendment of the bill, so as to present the question for adjudication in this new aspect.

By the decree of the 9th of May, 1851, the bill, so far as it relates to, or sought to recover for, or in respect of this note, was dismissed; though as to other matters, not then decided, it was retained, with liberty to the complainant to amend her bill by making a new party. And by the order of the 9th of February, 1852, sending the cause to the Auditor for an account, he was expressly restricted in stating the accounts to the questions left open and undecided by the opinion and decree of May, 1851.

With regard to this note, therefore, there has been a final adjudication upon this bill; and I cannot see how it could be amended, for the purpose of raising the question of the applicability of the note, as an asset in the hands of the defendant, to the payment of the pecuniary legacies.

If, upon the original bill, the complainant's title to the note in question, as a gift from her father to her, had been the only question presented, and the Court, entertaining the opinion which has been pronounced, had dismissed the bill absolutely, there could of course be no doubt that an amendment under such circumstances could not be made. The bill being gone, there would be nothing to amend; and if any remedy remained to the party, other than by way of appeal, it would have been by filing a new bill. Does it make any difference that the bill was retained for the purpose of litigating other matters embraced in it, altogether unconnected with it, and distinct from the claim to this note? In my opinion, it does not. The bill, with reference to this note, is no longer before the Court; nor could any question with regard to it be litigated here after the decree of May, 1851. The complainant's second exception, therefore, which objects to the report of the Auditor, because he has not charged the defendant Davis with the sum of $1,139 08, the proportion of said note which would be applicable to the payment of the complainant's legacy of $5,000, if said note is to be treated as an asset for the payment of the legacies, as shown by the account C, must be overruled.

The account A, shows the sum which Mrs. Hitch is entitled

to receive on account of her legacy to be $1,736 30; and the complainant's first exception insists that Davis should be charged with interest on this sum from the time the same was in his hands and payable, until the same was paid on the 20th of June, 1844. It appears by the defendant's vouchers 1 and 2, that he purchased for Mrs. Hitch, on the 18th and 20th of June, 1844, bonds of the Baltimore and Ohio Railroad Company, amounting together to $1,736 30, being her proportion of the assets in the hands of Davis, as executor of Solomon Betts, as shown by the accounts in the Orphans Court, and the question raised by the exception is, whether the complainant is not entitled to interest on this sum from an earlier date than June, 1844, when the investment was made.

The rule is, that when no time is fixed by the will for the payment of a legacy, it will bear interest from the expiration of one year after the death of the testator. *Crain* vs. *Barnes and Fergusson*, 1 *Maryland Chancery Decisions*, 151. Mr. Betts, the testator, died in November, 1841; and as no time was fixed by his will for the payment of the legacy, I am of opinion that the complainant is entitled to interest upon it from the end of a year after the death, and this exception, therefore, must be ruled good.

The account B, reported by the Auditor, shows that the defendant has overpaid the trust estate, and that it is indebted to him in the sum of $56 77; but this account, as already stated, is erroneous in not charging him with interest on the sum of $1,736 30, from the period mentioned; and it moreover credits him with the sum of $313 49, for which no vouchers have been produced, and this credit constitutes the ground of the complainant's third exception. The Chancellor understood, in the course of the argument, that this exception would be waived, and the credit allowed to stand; but I do not find that this has been put upon the record. But as the case must go again to the Auditor, an opportunity will be had for such admissions and agreements as the parties may choose to make, or for the production of proof in support of the credits, if necessary.

IN THE MATTER OF THE ESTATE OF RACHEL COLVIN, A LUNATIC. } JULY TERM, 1851.

[LUNACY AND LUNATICS—RECEIVERS—JURISDICTION—ADMINISTRATOR PENDENTE LITE—APPEALS.]

THE authority of the Court of Chancery in this State, to take charge of the estates and persons of idiots and lunatics, is derived from the 6th section of the Act of 1785, ch. 72, which gives the Chancellor full power, in all cases, to superintend, govern, and manage their estates and persons.

The power of appointment of a committee for a lunatic is a discretionary one in the Chancellor, and cannot be reviewed by any other Court, though it should not be exercised arbitrarily or capriciously, and without regard to the wishes or recommendations of those interested in the estate, or who feel an interest in the person of the lunatic.

Though the committee is usually appointed on the nomination of the person who sues out the commission of lunacy, yet a *caveat* may be entered against the appointment, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making the selection.

Though in this State it is more usual to appoint the same party committee of the person and estate, yet not unfrequently the practice is different, and from peculiar circumstances it is sometimes eminently proper to intrust the person of the lunatic to one committee, and his estate to another.

The rule of the Court in making such appointment, other things being equal, is to appoint him who is recommended by the greatest number of those who are entitled to be heard.

The will of a lunatic, though made when she was *compos mentis*, and though she may never be restored to mental capacity so as to revoke it, is still, in legal contemplation, ambulatory until her death, and until then can confer no rights, and can have no influence on the Court in appointing her committee.

The great and leading object in the selection of persons for the management of the estates of lunatics, and the custody of their persons, is to advance their welfare and comfort, and the interests of those who may be entitled to the succession is wholly subordinate to this.

The law now presumes that the nearest of kin to the lunatic will treat him with more affection than strangers to his blood, and hence consanguinity, though it confers no positive title, is now considered a recommendation in the selection of a committee, and a strong ground must be shown before it will be disregarded.

If the person recommended is embarrassed by pecuniary difficulties, and

there is any reasonable ground for apprehending that he would be likely to employ the money which may come to his hands as committee, in his own affairs, it would operate with powerful force against his appointment.

The death of the lunatic determines the office of the committee, and the only power Chancery retains over the committee, as such, is to compel him to account and deliver possession of the property as the Court shall direct.

But the committee is to retain possession and preserve the property until some person shall appear properly authorized to receive it from him; and, in the mean time, if there is reason to apprehend delay in ascertaining who are entitled to the possession, a receiver may be appointed upon application of the parties in interest.

The jurisdiction of Chancery in lunacy remains, after the death of the lunatic, only to the extent and for the purpose of having the necessary accounts taken, and directing the fund or estate to be paid over to the party or parties entitled.

After the death of the lunatic, Chancery will not administer the fund even for the benefit of creditors; they must pursue their remedies before the ordinary jurisdictions; nor will the Court adjudicate questions of right between opposing claimants.

The 23d section of the 4th article of the new Constitution, prohibits the origination of "new business" in the Court of Chancery, after the adoption of that instrument by the people. A cause in lunacy was depending in the Court before, and the lunatic died after, such adoption. A petition was then filed by parties in interest for the appointment of a receiver, upon the ground that there was a contest in the Orphans Court respecting the will of the lunatic, and delay would occur before any one entitled to the estate would appear.

HELD—that it is a question not free from doubt, whether such petition be not *new business* in the sense of the Constitution, though the Chancellor inclines to think that, under the peculiar circumstances of this case, the Court had the power to appoint the receiver for the temporary purpose of holding and preserving the property, until some person entitled to receive it should appear, and passed an order accordingly.

There is no doubt of the authority of this Court to protect the property of an intestate or testator, by appointing a receiver, pending a litigation in the Orphans Court for probate or administration.

The Court in such cases proceeds upon the ground that the property is in danger, because it may get into the hands of persons who have nothing to do with it, and it will not forbear to exercise the power to appoint a receiver, because the Orphans Court *may* provide for the collection of the effects of the deceased by granting letters *pendente lite*.

An administrator *pendente lite* is entitled and bound to collect the effects of the deceased; he may sue for debts due the deceased, and bring ejectment for leasehold estate even against the heir or next of kin; and his powers,

except as to the authority to sell the goods of the deceased, are co-extensive with those of the general administrator.

Chancery has no power to appoint a receiver *after* the grant of letters *pendente lite* by the Orphans Court, and if such receiver has been previously appointed, his powers cease upon the grant of such letters, and he will be discharged and directed to deliver over the property to such administrator.

It has been the usual practice for administrators *pendente lite* to give bonds, and there is no doubt of the legal validity of such bonds.

The general rule is, that an appeal will not lie from a merely practical order of this Court, preparatory to the final hearing, and by which the rights of the parties are not affected.

The Act of 1830, ch. 185, gives by implication an appeal from orders *appointing* receivers, but does not give the right of appeal from orders *discharging* receivers, and the legislature has never, in terms or by any fair implication, given such right. The power of appointing receivers is a high power, never exercised where it is likely to produce irreparable injustice, or where there exists any other safe or expedient remedy.

But if there is any reasonable doubt upon the question of the right of a party in interest to appeal from an order discharging a receiver, and directing him to account and pay over the property, it is clear no such right of appeal exists in the receiver himself.

A receiver has no rights whatever; he is but an officer of the Court; his appointment determines no right, and in no way affects the title of the property; his holding is the holding of the Court for him from whom the possession is taken, and he has no more right to ask for a revision of the order removing him than an entire stranger to the cause.

He is appointed on behalf of all parties, and not of the plaintiff or one defendant only, and when the title to the property has been ascertained, the receiver will be considered the receiver of the party so entitled.

The fact that a receiver has entered an appeal from the order discharging him, and filed an approved appeal bond, will not prevent this Court from enforcing by attachment its order of removal.

Whether an appeal will lie or not in any given case is exclusively a question for the Appellate Court to decide.

[The facts of this case are so fully stated in the several following opinions of the Chancellor, as to require no additional statement.]

THE CHANCELLOR:

Upon the petition of Richard C. Warford, filed on the Equity side of Baltimore County Court, on the 6th of November, 1850, a writ *de lunatico inquirendo*, issued to the Sheriff

of that County, to inquire into the lunacy of the party, and by an inquisition taken on the 5th of December then ensuing, the jury found her to be a lunatic, not enjoying lucid intervals, and that she is not sufficient for the government of herself or her property, and that she has been in the same state from the month of April, 1849; but by what means she became a lunatic, the jurors say they do not know, unless by the visitation of God.

Subsequently, to wit, on the 16th of December, 1850, Elisha Warford and others, being of the next of kin, and heirs-at-law of the lunatic, filed their petition in the cause, in which, while they admit that Rachel Colvin is now of unsound mind, they insist that her mental infirmity goes back to an earlier period than that found by the jury, and object to the inquisition on that account; and they likewise object to the appointment of Richard C. Warford, and his sister Rachel J. Warford, either jointly or severally, as the committee of the estate or person of the lunatic, and pray that one Benjamin H. Ellicott may be appointed committee of the estate, and that he and his wife, Mary Ann Ellicott, may be appointed committee of her person.

After the proceedings had been transferred to this Court, upon the suggestion of Elisha Warford, and those who are associated with him, a petition was filed by Ann Sharp and Thompson Pegg and wife, the said Sharp and Mrs. Pegg being also of the next of kin, and presumptive heirs-at-law of the lunatic, in which, for the reasons stated in their petition, they object to the appointment of any of the persons previously recommended, to take charge of the estate, and urge the appointment of St. George W. Teakle, Esquire, as a person peculiarly qualified, from his long and intimate acquaintance with the lunatic and her estate, to discharge the duties of committee.

By an agreement filed on the 9th of this month, the objections to the confirmation of the inquisition are withdrawn, and it is agreed that it shall be confirmed upon certain terms, and

with reservations having reference to ulterior questions not now necessary to be adverted to.

The question, and the only question now to be considered, respects the person or persons who shall be appointed committee of the person and estate of the lunatic, and this question, though it cannot in any way affect the rights of the parties who may, upon the death of the lunatic, succeed to or be entitled to her estate, has been discussed with an earnestness and ability which show how deep an interest they take in it.

Whatever may be the true origin of the jurisdiction of the Chancery Court in England, over the estates and persons of idiots and lunatics, it is certain that the authority of the Court of Chancery in this State, to take charge of their estates and persons, is now derived from the 6th section of the Act of 1785, ch. 72, which confers upon the Chancellor full power and authority in all cases to superintend, direct, and govern their affairs and concerns, both as to the care of their persons, and management of their estates, and to appoint a committee, trustee or trustees, for such persons, and to make such orders and decrees respecting their persons and estates, as to him may seem proper.

The power of appointment is necessarily a discretionary one, and it is thought cannot be reviewed by any other Court, though it would be manifestly improper for the Chancellor to exercise it arbitrarily or capriciously, and without having any regard to the lunatic, or the wishes or recommendation of those who may be presumed to be interested in the estate, or to feel an interest in his or her person. And accordingly, though it most frequently happens that the committee is appointed on the nomination of the person who sues out the commission of lunacy, a *caveat* may be entered against the person so nominated, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making a selection. This is the established practice, and the propriety of it is apparent.

Though in this State it is more usual to appoint the same person committee of the person and estate, the cases are not

unfrequent, in which the person of the lunatic is intrusted to one committee, and his estate to another; and this practice prevails elsewhere, and is sometimes, from peculiar circumstances, eminently proper. 2 *Story's Eq. Sec.* 1364. In this case, it unfortunately happens that the parties interested in the estate of the lunatic, that is, those who in case of her dying intestate would succeed to it, differ very widely and irreconcilably in regard to the person to whom the management of it should be confided, and it becomes the duty of the Court, therefore, to make a selection from the persons recommended, and in doing so, it must be understood that no imputation is intended to be cast upon the party whose claims to fulfil this office may not prevail. The Court must examine the materials brought before it, as a guide to its discretion, and having done so, and made a selection upon the principle which obtains in this and analogous cases, it would be a forced and unreasonable conclusion, to infer that the party whose pretensions are overlooked, or set aside in favor of another, is deemed by this Court unworthy of its confidence.

Confining our attention to those who would, in case of the death of the lunatic at this time, intestate, be entitled to her estate, it is clear, other things being equal, that the appointment, so far as the property is concerned, should be conferred on Benjamin H. Ellicott, as, conceding that the recommendation of him by Ann Hudutt, has been withdrawn, there will still be found a larger interest uniting in his favor, than of either of the other persons. If a majority of the parties in interest do not concur in his recommendation, a considerable plurality certainly does, and this circumstance unquestionably is entitled to much weight.

Sensible, it is presumed, of the influence of this consideration, the petitioner, Richard C. Warford, brings to the notice of the Court two wills, executed by the lunatic, the first in the year 1845, and the last in the year 1848, by either of which the largest portion of her estate is devised and bequeathed to him; and these wills, it is insisted, are fit to be considered, either as indicative of his interest in the estate, or of the con-

fidence and regard which the lunatic felt for him at the period of their execution.

The introduction of these papers has opened a fruitful subject of inquiry, and has induced the parties to collect a vast mass of evidence touching their validity or invalidity, as testamentary dispositions of property.

It is most certain that these papers cannot be regarded as wills. Miss Colvin, the lunatic, is still living, and though the papers, or either of them, may have been executed when she was *compos mentis*, and she may never be restored to her mental capacity, so as to enable her to revoke them if so disposed, still, in legal contemplation, they are ambulatory until her death, and can confer no rights until then.

To enter at this time into an examination of the circumstances upon which the efficacy of these papers may depend, would be to engage in a duty entirely premature, and out of place; and it occurs to me that it would not be proper, whilst declining to make that examination, to permit these papers to influence the decision of the question now before the Court.

The petitioner, Richard C. Warford, seeks to counteract the effect of the recommendation of Elisha Warford, and those who have united with him in favor of Benjamin H. Ellicott, by showing that, under certain instruments of writing executed by the lunatic, he will, at her death, be entitled to the largest portion of her estate; and thereupon the parties now, in the lifetime of the lunatic, engage in a controversy respecting those papers; and it would, as it appears to me, be the clear duty of the Court to investigate the evidence produced upon this point before it could determine what degree of influence to give these papers. It would be manifestly unjust to suffer them to outweigh, or even weaken the recommendations of the next of kin and presumptive heirs-at-law, without looking into and considering the evidence introduced by them to show, either that the papers never had a legal existence, or if they had, that they were revoked by papers subsequently executed; and thus the Court would find itself engaged in deciding upon the validity or invalidity of a will during the life of the alleged testator.

To avoid a proceeding so unusual and anomalous, there seems no alternative but to confine our attention, in deciding upon this application, exclusively to the rights of the parties as they are defined and ascertained by the law; and thus limiting the inquiry, and it appearing, as before remarked, that the recommendation of Mr. Ellicott decidedly preponderates over those in favor of the other persons, it follows that he should be appointed, unless the parties opposing him have succeeded in showing that he is personally unfit for the trust; the ruling principle being the personal fitness of the person for the office.

With a view to make up my judgment upon this point, I have carefully read all the evidence bearing upon it, and have listened with attention and interest to the elaborate arguments of counsel on the one side and the other, and have arrived at the settled conviction that Mr. Ellicott is a fit and proper person to be clothed with this delicate and important trust. His integrity, his business capacity and habits, stand vindicated by the proof, and I can see nothing in the character of the pursuits in which he is engaged from which it can be fairly inferred or reasonably apprehended that he will not faithfully perform his trust. I fully concur in the principle established in the case of *Eunice Salisbury, a lunatic*, 3 *Johns. Ch. Rep.*, 347, and the other cases which have been cited on the same point, that the great and leading object in the selection of persons for the management of the estates of lunatics, and the care and custody of their persons, is to advance their welfare and comfort; and that the interest of those who may be entitled to the succession is wholly subordinate to this. In fact, the old rule which excluded, as a matter of course, the next of kin of a lunatic from the office of committee of his person, if such next of kin was also his heir-at-law, has been broken down, because, contrary to the presumption which prevailed in barbarous times, the law now supposes that those who stand nearest to the lunatic by the ties of kindred, will treat him with more affection and patient fortitude than strangers to his blood; and hence consanguinity, though it confers no positive title, is now considered as a considerable recommendation in the selection of a

committee, and a strong ground must be shown before it will be disregarded. *In the matter of Mary Livingston, a lunatic*, 1 *Johns. Ch. Rep.*, 436. *Ex parte Cockayne*, 7 *Ves.*, 591. *Ex parte Le Heup*, 18 *Ves.*, 227. If in this case there exists any ground for supposing that Mr. Ellicott, in managing the estate of this unfortunate lady, would consult rather the interests of the persons who may succeed to it upon her death than her comfort and welfare, the Court would undoubtedly give full weight to that consideration. But no such ground appears. On the contrary, forming an opinion on the evidence, there is every reason to believe he will discharge his trust with fidelity, alike to the lunatic and to those who, upon her death, may be entitled to call upon him for an account of his stewardship.

The Court might, in the exercise of its discretion, associate another with him in the trust, but this is not often done; and there are reasons which frequently, and perhaps in this case especially, render it inexpedient. It has been suggested, and authorities cited to show, that persons embarrassed by pecuniary difficulties, and who, under the pressure of such difficulties, might be tempted to use the money or estate of the lunatic improperly, are not fit to be placed in offices of this description. That such a consideration is entitled to weight, is shown by the case of *Ex parte Proctor*, 1 *Swanston*, 531, 533; and I am free to say, that if I could see in this evidence any reasonable ground for apprehending that Mr. Ellicott would be likely to employ the money which may come to his hands, as committee of this estate, in his own affairs, or for his own benefit, it would operate with powerful force against his appointment. But I can see no such ground in the proof; and besides, the very character of the order of appointment, and the security which will be taken for the performance of the duties of the committee, render any misapplication of the trust estate extremely improbable. The committee, by the terms of the order, is required to return an inventory of the lunatic's estate within six months from the date of the order, and to account for his receipts and expenditures once in each year, and oftener, if required.

Seeing, then, that Mr. Ellicott stands free from any well-founded personal objection, and that while there is no reason to suppose that he will be unmindful of the interest of the lunatic, he is the choice of more of those entitled to the succession than either of the other persons recommended, I consider it my duty to confer the appointment upon him; but in doing so, and in putting aside the claims of the other persons recommended for the office, I am not to be understood as concurring in the imputation of misconduct, and consequent unfitness for the trust, which has been urged against Richard C. Warford, one of them. Upon that subject I express no opinion, resting my judgment wholly upon what I consider the rule of the Court, other things being equal, to appoint him who is recommended by the greatest number of those who are entitled to be heard.

But whilst I place the property in the hands of Benjamin H. Ellicott, I shall confide the person of the lunatic to the care of Mrs. Mary Ann Ellicott and Miss Rachel J. Warford, her kinswomen. The evidence shows conclusively, and it has been fully conceded on all hands, that they are peculiarly and eminently deserving of the trust, and that their unfortunate relative will receive from them the kindness and tender regard and solicitude which her afflicting situation requires; and as her fortune is ample, the most liberal allowance for her comfort will be made.

The view which I have taken of this case, relieves me from the necessity of expressing an opinion upon the admissibility of the evidence which has been excepted to.

[Afterwards, to wit, on the 5th of February, 1853, a petition was filed in the cause by Joseph Cain and others, stating that they are among the next of kin of said lunatic, and that said lunatic had departed this life having left a will, the probate of which is disputed; that, in the mean time, there is no one to whom Benjamin H. Ellicott, the committee of her estate, can deliver the same, either personal or real, which is, therefore, liable to loss and injury, and praying that a receiver may be appointed to take possession of the estate of said lunatic,

both personal and real, until some one having right to the same shall appear, to whom it can be delivered, or until further order of this Court in the premises, and recommending the said Ellicott as the proper person to be appointed such receiver. The Chancellor on the same day, but previous to the filing of this petition, made the following remarks.]

THE CHANCELLOR:

Upon looking more carefully into the question affecting the authority of the committee, after the death of the lunatic, I am satisfied that his office is determined by that event; and that the only power which the Court retains over the committee as such, is to compel him to account and to deliver possession of the property, as the Court shall direct. But the committee is to retain the possession, and preserve the property from injury, until some person shall appear properly authorized to receive it from him. In the mean time, if there is reason to apprehend delay in ascertaining who are entitled to the possession, a receiver may be appointed upon the application of the parties in interest, as was done in the case of the *Duchess of Norfolk*, cited in *Shelford on Lunacy*, 210.

[Accordingly, on the 9th of February, 1853, the Chancellor passed an order, appointing the said Ellicott a receiver, "with full power and authority to take charge and possession of the estate of the said Rachel Colvin deceased, real, personal, and mixed, now in the possession of the committee of the said deceased under a former order of this Court, and to hold and manage the same in all respects as the said committee, during the continuance of his office and authority, was empowered to do." The order then requires him to give bond in the penalty of $30,000 for the faithful performance of his duties as such receiver. "And power is hereby expressly reserved to this Court to change, modify, or annul this order, and to discharge the receiver hereby appointed, and to pass all such orders and decrees in the premises as may hereafter be deemed necessary and proper." Subsequently to this, Richard C. Warford

was appointed administrator *pendente lite* of the personal estate of the lunatic by the Orphans Court of Baltimore City; and by his petition, filed on the 1st of March, 1853, he prayed that the order of the 9th of February, 1853, might be rescinded, the receiver discharged, and an account taken, &c. Upon the hearing of this petition, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

Upon the petition of certain parties claiming to be interested in the estate of the deceased Rachel Colvin, formerly a lunatic, and whose estate and person were in the care and custody of trustees appointed by this Court, as shown by the proceedings in the cause, an order passed on the 9th of February last, appointing Benjamin H. Ellicott receiver, with certain powers as in the said order are specified and defined. The same party, by an order in lunacy, had been appointed committee of her estate, the Court, for reasons stated on a former occasion, having thought it expedient to commit the care of her person to other parties.

The lunatic is now dead, and there being a contest likely to be protracted, in regard to the validity of a certain paper writing, or writings, purporting to be her will, the Orphans Court of Baltimore City have granted letters of administration *pendente lite* to Richard C. Warford, who has accepted the trust and given an approved bond for the faithful performance of the duties of the office.

The administrator thus appointed and qualified, by his petition filed on the 1st of the present month (March, 1853), prays that the order of the 9th of February may be rescinded, the receiver discharged, and an account taken, to the end that he may be compelled, as committee and receiver, to bring into Court all moneys collected and received by him in both capacities. Upon this petition, an order passed for a hearing, and the questions presented by the petition have been argued by counsel, upon its allegations, the answer thereto, and certain depositions and facts introduced by agreement of parties.

The question first raised, has reference to the constitutional power of the Court to pass the order of the 9th of February, 1853. The new Constitution, which abolishes this Court prospectively, was ratified by the people in June, 1851. By the proviso to the 23d section of article 4, it is provided "That no new business shall originate in the said Court; nor shall any cause be removed to the same from any other Court, from and after the ratification of this Constitution." It is clear, therefore, that if the petition upon which the order in question was passed, can be regarded as new business, in the sense of the Constitution, this Court had no power to entertain it. But if, on the contrary, it may be considered as a proceeding in a cause depending here at the period of the adoption of the Constitution, it was quite competent to the Court to receive and act upon it; because by the section referred to, the powers of the Court with reference to depending causes, are continued to a period which has not yet arrived.

In passing the order of the 9th of February, the question of the Court's power, as affected by the new Constitution, was not adverted to. If it had been, there might perhaps have been more hesitation than was felt at the time; though I am not now prepared to say, that the petition to have a receiver appointed in this case can be viewed as the commencement of a new suit in this Court. In the first place, the petition was filed, and properly filed in the lunacy cause. It is very true, and not denied that the death of the lunatic put an end to the office of the committee; and that the jurisdiction of the Court in the lunacy cause was determined by the same event, except for the purpose of having the necessary accounts taken and directing the fund or estate to be paid over to the party or parties entitled. But to this extent, and for this purpose, the jurisdiction remained. The cause, therefore, was not out of Court. Orders passed in it directing accounts to be taken, or proof to be taken, if necessary, and compelling the committee to pay over the property to the party entitled, would not be *coram non judice.*

The situation of the cause then, was this: the Court had in

the hands of an officer of its appointment, and under its control, this large estate ; that officer, by the death of the lunatic, was *functus officio;* he could no longer act as committee in receiving rents, collecting money, or performing any act appertaining to his office. The Court could not discharge itself, or the committee, of the possession of the estate, until some one should appear entitled to receive it, and there was reason to believe that some time would elapse before any one so entitled would appear. Under these circumstances, it may certainly be maintained with some degree of plausibility, that an order passed in the same cause, directing the estate to be handed over by one officer of the Court, whose powers were at an end, to another, who could take care of and receive the rents and income of the property, for the benefit of the parties who may be entitled, was not new business within the meaning of the Constitution, but the exercise of the conservative power of the Court, and a duty thrown upon it by the proceedings in the lunacy cause. The order appointing the receiver, determined no question of right, nor did it interfere with any remedy previously open to the parties. No new parties were necessary to be made. It was simply an application to the Court in the cause, then, for certain purposes depending in it, to take the property out of hands powerless for its useful management, and transfer it to another officer, who could not only preserve it from waste and destruction, but who would be at liberty, and required to receive and accumulate its accretion, until some person should appear to whom it could be committed.

It appears to me that it is by no means clear, that such a proceeding for such a temporary and useful object, adopted in a cause actually depending in the Court for some purposes, is the institution of new business within the intent and meaning of the Constitution. In ordinary cases, the appointment of a receiver is ancillary to the main object of the cause. The object is to preserve the property in controversy until the Court shall determine the question of right between the parties. But in this case it never was in the contemplation of the Court, to determine any such question. It was only pro-

posed to hold and preserve the property until some person, whose title had been established elsewhere, should appear and demand it. The Court, says *Mr. Alexander*, in his *Chancery Practice*, after the death of the lunatic "will not administer the fund even for the benefit of creditors;" "they must pursue their remedies before the ordinary jurisdictions;" "nor will the Court adjudicate questions of right between opposing claimants;" and in these views he is fully supported by the authorities here and in England. So here, in the appointment of a receiver, impelled by the exigency of the case as disclosed by the petition, the Court did not mean to invite or entertain a controversy to be carried on in regard to the title to this property. It merely meant to preserve it in safety and intact until, by proceedings before the ordinary jurisdictions, the right to the possession should be ascertained, and upon reference to the terms of the order of the 9th of February, it will be apparent that this was its character.

But without intending to express a decided opinion upon this question, which is certainly not free from doubt, the point next to be considered is the order proper to be passed, now that administration has been granted, and the administrator is here asking to have the personal estate paid over to him, and for an account of it, since it has been held by the committee and receivers.

Nothing can be clearer than that if the estate had remained in the hands of the committee of the lunatic, and full letters of administration, or letters testamentary had been granted to any one, the right of such administrator or executor to the personal estate would have been incontestable. This, of course, is conceded. But it is said the property here is not in the hands of the committee, but in those of a receiver, and this Court having assumed jurisdiction of the cause by the appointment of the latter, no other Court of merely concurrent or co-ordinate jurisdiction can interfere; and the case of *Albert and Wife* vs. *Winn & Ross*, 7 *Gill*, 446, is referred to in support of this position.

This view of the case, however, would give a much more

extensive operation to the order of the 9th of February, and the petition on which it was passed, than was in the contemplation of the Court at the time, or is warranted by the statement and prayer of the petition itself. The prayer, which seems to have been founded upon the remarks of the Court of the 5th of February, is "that a receiver may be appointed to take possession of the estate of the said Rachel, until some one having right to the same shall appear, to whom it can be delivered, or until the further order of the Court. In the case of *Albert and Wife* vs. *Winn & Ross*, this Court, upon a bill first filed here, had possessed itself of the administration of the estate of Jones, and had forbidden, by injunction, the adoption of any measures in any other Court, or *in pais*, by his creditors, for the purpose of securing to themselves preferences in the payment of their claims, and after the injunction had been granted, and whilst it was in full force, Albert and Wife, his creditors, by a proceeding in the Baltimore County Court, on its equity side, attempted to secure to themselves a preference. It was this attempt, in violation of the previous injunction, which by a subsequent order this Court prohibited, which was the subject of contest in the Court of Appeals. And the order of this Court, restraining proceedings in the Baltimore County Court, was placed upon the express ground that by the first bill here, the entire administration of Jones's estate was brought before it for adjudication, and this was the view adopted by the Court of Appeals upon the appeal.

But that case is not at all like the present. Here, from the terms of the petition upon which the order of the 9th of February last was passed, and the language of the order itself, it is manifest it was intended to be provisional and temporary only, being merely designed to preserve the estate until some one properly authorized should appear to claim it, and the right so to claim was to be a question to be inquired into and determined elsewhere. This Court certainly, in passing that order, did not design to take to itself the administration of the estate of the deceased, which would, in my judgment, have

been an unwarrantable usurpation of the jurisdiction of the Orphans Court.

The question, then, is whether the time has now arrived when this Court may *let go its hold* of the personal estate of the deceased, taken into its possession, as we have seen, merely to preserve it from destruction or diminution, and this raises the question of the extent of the authority of the administrator *pendente lite*. There can, I presume, be no doubt of the authority of this Court to protect the property of an intestate or testator, by appointing a receiver pending a litigation in the Ecclesiastical Court for probate or administration. It was assumed by *Lord Eldon* as free from doubt, in the case *King* vs. *King*, 6 *Ves.*, 172, and though apparently to some extent shaken by *Lord Erskine* in *Richards* vs. *Chave*, 12 *Ves.*, 462, it has been fully and firmly established in subsequent cases. See *Edmunds* vs. *Bird*, 1 *Ves. & Bea.*, 542; *Atkinson* vs. *Henshaw*, 2 *Ves. & Bea.*, 85; *Ball* vs. *Oliver*, *ib.*, 96. The Court, in such cases, proceeds upon the ground that the property is in danger, because it may get into the hands of persons who have nothing to do with it; and it will not forbear to appoint a receiver, because the Ecclesiastical Court may provide for the collection of the effects of the deceased by granting letters *pendente lite*. This is the conclusion of the cases refered to, and is asserted to be the rule in 1 *Williams on Executors*, 339, 340 (2 *Am. Ed*).

Having then the power to appoint a receiver, pending the litigation in the Orphans Court for probate or administration, although that Court, by granting administration *pendente lite*, might provide for the collection of the effects, the question remains, will this Court continue the office of receiver after the Orphans Court has actually made such appointment? The ground, as stated by *Lord Eldon* in *King* vs. *King*, upon which the Court proceeds in appointing the receiver pending the litigation in the Ecclesiastical Court is, "that the property is in danger in this sense, that it may get into the hands of persons who have nothing to do with it." But this observation is, of course, inapplicable to the case of an administrator *pen-*

dente lite. He is unquestionably entitled, and is bound to collect and to possess himself of the effects of the deceased, it being now settled, whatever doubts may formerly have been entertained, that he may maintain suits for debts due the deceased, and bring ejectment for leasehold estate against the heirs or next of kin, or any other person who may be in possession of it. 1 *Williams's Executors*, 313. And in the *Deputy Commissary's Guide*, 56, 57, the powers of these temporary administrators, with the exception of the authority of selling the goods of the deceased, are said to be co-extensive in all respects with the general administrator. However this may be, there can be no doubt of his authority and duty to possess himself of the personal property of the deceased, and to bring suit to recover it, if any one, even the heir-at-law or next of kin, withhold it from him. It certainly cannot be said of a person clothed with such powers and burdened with such duties, that he is a person who has nothing to do with the personal estate of the deceased, and that to prevent it from falling into his hands, this Court should interpose by putting in a receiver.

All the cases cited by the counsel for the receiver, except that of *Atkinson* vs. *Henshaw*, 2 *Ves. & Bea.*, 86, strongly imply that though the power of the Court of Probate to grant letters *pendente lite* would not oust the Court of Chancery of the authority to appoint a receiver, to preserve the property pending the litigation, yet the actual grant of such letters would have that effect by removing the necessity for such appointment. But *Lord Eldon*, in *Atkinson* vs. *Henshaw*, speaking of the effect of the decision in *Walker* vs. *Woollaston*, 2 *Peere Wms.*, 576, that an administrator *pendente lite* might maintain an action to recover the possession of the personal effects of the deceased, and after maintaining that such a right in the temporary administrator did not deprive chancery of the jurisdiction to appoint a receiver *pendente lite*, intimates a doubt whether the actual appointment of such administrator would obviate the necessity for a receiver. It will be seen, however, that it is a mere doubt. The case before him was

one in which administration *pendente lite* had not been granted, and as was said by him in the same paragraph in which the doubt is expressed, "much destruction of property may take place *before* the appointment of such administrator."

But no case has been nor I believe can be produced, in which this Court has appointed a receiver *after* the grant of letters *pendente lite* by the Ecclesiastical Court, and the power of this Court to act in such a case rests entirely, so far as I am informed, upon the doubt thrown out by *Lord Eldon* in the case referred to. The effect of this doubt, moreover, is much weakened, if not entirely overthrown, by the case of *Rendall* vs. *Rendall*, 23 *Eng. Ch. Rep.*, 152, in which the Vice-Chancellor decided, that a receiver will not be appointed pending a litigation to recall probate or grant of administration, unless a special case can be made out for such appointment, adopting in the conclusion of his judgment the language of *Lord Cottenham*, that "there is no doubt that by the rule of this Court, if the representation is in contest, and no person has been constituted executor, the Court interferes, *not because of the contest*, but *because there is no proper person to receive the assets.*" If, therefore, there be a proper person to receive the assets, the litigation in the Orphans Court is immaterial. The Court on that account will not interfere. These observations are strong against the prolongation of the powers of the receiver, because none can doubt that an administrator *pendente lite* is a proper person to receive the assets. His authority in this respect is as complete as that of the general administrator.

Upon the grant of full letters of administration or letters testamentary, the powers of the receiver would of course cease, because then the litigation in the Orphans Court would be at an end, and to keep the property here would be to strip the latter Court of its acknowledged jurisdiction over the personal estates of deceased persons. But why should not the same result follow upon the grant of temporary letters? The limitations upon the power of such an administrator, as defined by *Mr. Williams* in his treatise *on executors*, before referred to,

are certainly not of a character to render it necessary to continue the office of receiver. Even with those limitations his authority is more ample than the authority of the receiver, who cannot sue unless specially authorized by the Court to do so. And if the definition of the power of an administrator *pendente lite*, as given in the Commissary's Guide, is the true one, then the reason for discontinuing the office of receiver upon the grant of such letters is still more obvious. This Court, it is presumed, would scarcely undertake to prohibit by injunction the grant of temporary administration by the Orphans Court after a receiver had been appointed here, and yet it would seem to be proper to do so, if after such grant the Court, through its receiver, will withhold the personal property of the deceased from the administrator. It appears to me to be clear that when the necessity for the office of a receiver ceases, the office must cease, and that it would be a dangerous invasion by this Court of the jurisdiction of the Orphans Court, to retain the property of the deceased here, when that Court had appointed an officer with competent powers to take possession of it.

It is not, of course, pretended that this Court, or any Court, in a collateral proceeding, can review or revise the judgment of the Orphans Court, in granting the letters in question. Their power to grant such letters cannot be questioned since the Act of 1810, ch. 34, if it did not exist before; and by the 6th section of that act full discretion is given to make the grant to either of the three classes of persons therein mentioned, and it is not denied, that the person to whom the grant was made in this case falls within one or more of the classes, assuming, as is proper, that the will propounded for probate is the contested will.

But it is said that an administrator *pendente lite* is not required to give bond, and this is urged as a reason why the property should not be allowed to go into his hands, though, in point of fact, he has given a bond which has been approved by the Orphans Court. In the *Commissary's Guide*, 57, speaking of the duty of such temporary administrator to account

with the executor, or full administrator, when the contest is determined, and the power of the latter is complete to call on him for such account, the author says, "in case of maladministration, the temporary administrator may be cited before the Commissary-General, or his bond may be put in suit," and at page 190 the form of the bond is given. Upon this authority, and the universal practice and fitness of the thing, I should entertain no doubt of the necessity of a bond in such cases, and of the validity of the bond; but in addition to it, we have the case of *State* vs. *Craddock*, 7 *H. & J.*, 40, in which, though the suit on the bond was not maintained, its legal validity was assumed in the clearest terms.

I am, therefore, of opinion, that so far as the personal estate of the deceased is concerned, the receiver must be discharged, the accounts taken separately, whilst he held it in that capacity and as committee of the lunatic, and the property itself, and its accumulations, be delivered over to the administrator *pendente lite*. And the only remaining question is, shall the receiver be continued with reference to the real estate?

Two or three considerations induce me to answer this question in the negative, and have brought my mind to the conclusion that he should be discharged as to the real estate also. As has been already stated, the constitutional power of this Court to entertain the petition for the appointment of a receiver, and to pass the order of the 9th of February last, has been seriously questioned; and though, for the reasons before mentioned, I am inclined to think that, under the peculiar circumstances of the case at that time, and to the extent and for the purpose contemplated by that order, the Court did possess the power to pass it, I am yet free to admit that it is a question upon which grave doubts may exist, and the very existence of such doubts would incline the Court to forbear to exert the disputed power, unless some urgent necessity for so doing existed. Such necessity appeared to exist at that time, but does not now, because the parties interested are aware of the condition of the estate, as shown by the proceedings in the cause since the date of the order; and it is not to be doubted, if this

Court relinquishes the possession of the property, they will be prompt in applying to some Court competent to protect it from injury.

The order of the 9th of February, moreover, was passed *ex parte*, and necessarily so, because of the perils to which this large estate would have been exposed by the delay of giving notice to the parties in interest. But these parties are now here, some claiming to be heirs-at-law, and others devisees under a paper purporting to be the will of the deceased, and insisting that the receiver appointed by the order in question shall be removed, and others appointed in his place.

It is also a circumstance not unworthy of consideration, that the constitutional existence of this Court is limited to a period now rapidly approaching, and in all human probability, that period will have arrived and passed long before the controversy in regard to the will can be brought to a close. It is certainly far better that this valuable estate should be under the care and control of a permanent Court than of one which must cease to exist in a short time. As by the appointment of a receiver no question of right was decided, so by his discharge none will be touched; but the receiver, and those of the parties who desire him to fill that office, will be at liberty to go before the proper tribunal and ask for his appointment. No harm is done to any one by requiring him to settle his accounts, and to hand the property over to those who may be entitled to its possession. An order will be passed in conformity with these views.

[The Chancellor accordingly, on the 19th of April, 1853, passed an order discharging the receiver, and directing him to account, as stated in the above opinion. From this order the receiver entered an appeal, and filed an appeal bond. A motion was then made by the administrator *pendente lite*, for an attachment to compel the receiver to comply with the order of the 19th of April. Upon the hearing of this motion, the Chancellor delivered the following opinion, on the 17th of May, 1853.]

THE CHANCELLOR:

This is an application to enforce, by attachment, the order of the 19th April last, by which Benjamin H. Ellicott was removed from the office of receiver, to which he was appointed under a previous order of this Court, and directed to account and deliver to Richard C. Warford, administrator *pendente lite* of the deceased, the personal estate and effects in his hands; and the only questions which properly arise upon this application, are two. *First*, can the receiver appeal from the order? and *secondly*, if he cannot, will this Court, notwithstanding he has entered and filed an approved appeal bond, proceed to enforce its execution? In addition to these, however, the counsel have argued a *third*, and that is, whether an appeal will lie from the order in question, in behalf of any of the parties in interest? and upon each of these I propose very briefly to express an opinion.

It is conceded, that if the right of appeal exists, it is not in virtue of any statutory enactment expressly giving it. If it exists at all, the right is founded either upon general principles regulating the subject of appeals, or is derived, by implication, from some one of the various Acts of Assembly which have been passed from time to time, or is to be drawn from the general scope and spirit embodied in them as a whole.

The general rule undoubtedly is, that an appeal will not lie from a mere practical order of this Court, preparatory to the final hearing, and by which the rights of the parties are not affected. Such was announced to be the law in the case of *Thompson* vs. *M'Kim*, 6 *H. & J.*, 312, and is asserted in every subsequent case in which the subject has been spoken of in the Court of Appeals.

Now it cannot be said that an order appointing a receiver, or discharging him, has, or can have, any influence upon the rights of the parties. The late Chancellor, in 1 *Bland*, 421, laid down the rule upon the subject in the clearest terms, and the Court of Appeals, in *Ellicott* vs. *The United States Ins. Co.*, 7 *Gill.* 307, repeat and adopt his language.

It is true, that by the proviso to the 1st section of the Act

of 1830, ch. 185, an appeal by implication is given from orders appointing receivers, and appeals have been entertained from orders of that description, *Speights* vs. *Peters*, 9 *Gill*, 472; but as before said, the legislature has not yet extended it to orders discharging them. It is urged that the policy which dictated the Act of 1830, extends to orders of the kind now under consideration, and that the Courts should by construction enlarge the Act, so as to embrace them. But it appears to me that, independent of the obvious difference between an order which takes property out of the hands of its possessor, and leaves it in the hands of an officer of this Court, and one which restores it, or by which the Court surrenders its possession, the rule of construction contended for is a vicious one.

Assuming that the legislature, by the Act of 1830, designed to enlarge the right of appeal, and extend it to orders appointing receivers, is it legitimate to suppose they did not go so far as they intended to go? The subject of receivers was before them, and when they stopped short of the point now under consideration, that is, did not give the right of appeal from orders discharging receivers, it must be presumed they did not mean to do so. There are few powers exercised by the Court of Chancery which require greater caution than that of appointing receivers. It is, say the Court of Appeals, in the case of *Speights* vs. *Peters*, "a high power, never exercised where it is likely to produce irreparable injustice, or where there exists any other safe or expedient remedy." And it may well be that the legislature deemed it proper to provide for the revision of the exercise of this high power by a superior tribunal, when they did not choose to give an appeal, either when the Court of Chancery refused to exert the power, or having once exerted it, withdrew its authority by rescinding its order. However this may be, it is clear they have not in terms, or by any fair implication, given the right of appeal from an order like the one in question, and it would be legislation and not construction in the Courts to do it.

But if there could be a reasonable doubt upon the question, of the right of a party in interest to appeal from the order of

the 19th of April last, is it possible to conclude that such right exists on the part of the receiver himself? What is he? His character and functions are well defined by the late Chancellor, in *Williamson* vs. *Wilson*, 1 *Bland*, 421. He is declared to be "an officer of the Court." "He is truly and properly the hand of the Court, but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of the statute of limitations." "The holding of the receiver, is the holding of the Court for him from whom the possession was taken." In *Ellicott* vs. *The Insurance Co.*, this definition of the office of a receiver is quoted with approbation by the Court of Appeals, and hence it is clear that he has no rights whatever, and has no more authority to ask for a revision of the order removing him, than an entire stranger to the cause.

But it is said, that though he cannot complain of the order removing him, yet as this order goes further, and directs him to deliver over property to the administrator *pendente lite*, he may, on that account, be entitled to take the judgment of the Appellate Court. But what is it to him what the Court does with the property, provided he is discharged from his responsibility as receiver? And that he would be so discharged by obeying the order of the Court, cannot be questioned. It is, moreover, conceded that the receiver has no rights himself, and of course cannot appeal or interfere in any way in the conduct of the cause, unless he can be considered as representing those at whose instance he was appointed. But to view him in that light, would be to give him a character inconsistent with the nature of his office, as defined by Chancellor Bland. How can he be the officer of the Court, and the hand of the Court, and at the same time the representative of the interests of certain of the parties to the cause? The Court must act by its officers and agents, and there is as much propriety in calling the Court the representative of any of the parties to the cause, as its agents and officers, who derive their authority from the Court, and are removable at its discretion.

If, however, there could be a doubt upon the subject, it

would be removed by the passage from 5 *Lib. of Law & Eq.*, 435, quoted and adopted in the case of *Ellicott* vs. *The Insurance Co.*, which proves that a receiver is appointed on behalf of all parties and not of the plaintiff, or of one defendant only, and that when the title to the property has been ascertained, the receiver will be considered as his receiver. Surely it would be attended with dangerous consequences to allow parties in interest to stand back and shun personal responsibility for costs and damages, whilst the receiver, instigated by them, carried on controversies with other parties to the cause. If the receiver may prosecute this appeal on behalf of the parties whom he may be supposed to represent, why may he not interfere at any and every stage of the cause, when he may think the interests of those parties require it? But surely this could never be tolerated. The proceedings in the cause, except, indeed, where his own accounts and allowances are concerned, are as to him *res inter alios acta*, as was decided in regard to a trustee appointed by the Court to sell property and pay debts, in the case of *State use of Oyster* vs. *Annan*, 1 *G. & J.*, 450.

I hold it, therefore, to be too clear for doubt, that a receiver has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands; that he cannot in any sense, or to any extent be regarded as the representative of any one or more of the parties to the cause, and that he must retire from his office, and give up the property committed to his custody, whenever required so to do by the Court; and this, whether the power to discharge him was reserved or not, as was correctly stated in the argument. In this case, the power was expressly reserved, not because it was deemed necessary, but to indicate plainly to all parties that the order of the 9th of February last was to be regarded as temporary only, and only passed in view of the peculiar exigencies of the case.

The only remaining question is, will the Court, notwithstanding the appeal of the receiver and the bond given by him, execute the order appealed from? Why not? How can his rights be

affected one way or the other by the execution of the order, no matter what may be the decision of the Court of Appeals? It is not necessary to inquire into the origin of the practice of filing appeal bonds, to stay proceedings on the decrees or orders of the Court of Chancery pending the appeal, which was supposed by the Court of Appeals, in *Thompson* vs. *M'Kim*, to have been adopted by analogy to the provisions of the second section of the Act of 1713, ch. 4. The law upon the subject is now settled by the Act of 1826, ch. 200, sec. 1, which declares "that no execution upon any judgment or decree in any County Court, or other inferior Court, or Court of Chancery, shall be stayed or delayed, unless the person or persons against whom such judgment or decree shall be rendered or passed, his, her, or their heirs, executors, or administrators, or some other person or persons on their behalf, shall enter bond," &c. Now, can it with propriety be said that the receiver in this case is a person *against* whom a judgment or decree has been passed, or does the order touch his rights? Confessedly not, for he has no rights. He is simply removed from an office, which certainly was not conferred upon him for his own benefit, and he is required to deliver up and account for property to which it is conceded on all hands he has no shadow of title. The question then is, not whether this Court, or the Appellate Court is to decide whether an appeal will lie or not, in any given case. It has been settled by the case of *Oliver* vs. *Palmer & Hamilton*, 11 *G. & J.*, 137, that this is a question exclusively for the Court of Appeals. But the question here is, whether the order of this Court shall be stayed, because a party outside of the cause, who has no rights, and consequently against whose rights no order or decree has been or could be passed, thinks proper to pray an appeal and give bond? As well might it be said that the Register of this Court, when ordered to draw a check for money paid into Court to the credit of a cause, could stay the execution of the order, by appealing and giving bond. It appears to me impossible to maintain such a proposition. If the Court can be thus embarrassed and delayed by its officers and agents, it

would be rendered powerless for good, and prolific only of inconvenience and mischief.

In the answer of the receiver, filed on the 14th inst., he says distinctly that he has no interest in the estate, and therefore no disposition which can be made of it can in any way concern him. I therefore consider it my duty to enforce obedience to the order of the 19th of April, 1853 ; but inasmuch as the receiver disclaims expressly in his answer any intention to disregard the authority of this Court, or to treat its orders with contempt, I am not disposed, at once, to direct an attachment to issue against him, but will pass an order which will enable him, by yielding promptly to the authority of the Court, to protect himself against the consequences of that process.

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[An order was accordingly passed on the same day, (17th of May, 1853,) requiring the receiver to comply with the order of the 19th of April, 1853, "by yielding up and delivering to the said Richard Colvin Warford, administrator *pendente lite* of Rachel Colvin, deceased, the personal estate and effects of said deceased in his hands; and that as soon as may be conveniently practicable, he make report and account, as required by said order, and in all things execute and obey the same. And it is further ordered, that if the said Ellicott shall neglect or refuse to execute and perform said order, by yielding up and delivering to the said Richard Colvin Warford the personal estate and effects of said deceased, for the period of ten days after the service upon him of a copy of this order, that, upon proof of service and neglect or refusal, the writ of attachment will issue to compel obedience thereto."]

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Grafton L. Dulany, and Henry Winter Davis, for the Receiver.

Wm. Schley, Reverdy Johnson, and Frederick W. Brune, for the Administrator *pendente lite*.

WILLIAM O'HARA, GUARDIAN OF H. W. COBERTH,
vs.
BASIL SHEPHERD AND OTHERS.

March Term, 1851.

[GUARDIAN AND WARD—CHANCERY PRACTICE—ORPHANS COURT.]

A SUPPLEMENTAL bill, after a decree, must not seek to vary the principles of the decree, but, taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the Court to give full effect to its decision.

A supplemental bill may be filed as well after as before a decree; and if after, may be either in aid of the decree, that it may be carried into full execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it or by the defence made to it.

A supplemental bill, in the nature of a bill of review, cannot be filed without leave of the Court first obtained.

Upon a bill by a guardian against the ward's estate, a decree for an account was passed. Afterwards, and after the former guardian had resigned his office, the new guardian filed a supplemental bill, asking for a further account for a certain sum belonging to the same estate, for which it charged the administrator was responsible. HELD—That this supplemental bill did not make a new case, nor seek to vary the principle of the decree, and was properly filed by the new guardian.

An administrator, with the approval and sanction of the guardian, loaned a certain sum belonging to his intestate's estate, and the property of the minor, and assigned the mortgage taken for its security to the guardian. The Orphans Court subsequently passed the accounts of the guardian, in which this mortgage was treated as part of the ward's estate. HELD—That by this action of the Orphans Court, they had given their sanction to this transaction as effectually as if they had previously ordered it, and the administrator is not responsible for loss arising therefrom.

By the several Acts of 1798, ch. 101, 1816, chs. 154 and 203, and 1819, ch. 144, the Orphans Courts are empowered to direct the guardians of minors to invest the proceeds of the sales of their real, leasehold, or personal estates in public stocks, or other permanent funds, in the name of their wards.

The direction that the securities should be made in the name of the infant, is matter of form, and though very proper to be followed, yet could not have the effect of avoiding the security, if not pursued.

By the Act of 1831, ch. 315, the Orphans Courts are authorized to order executors, administrators, and guardians to bring into Court or place in

bank stock, or any other good security, any money or funds received by them, and to direct the manner and form in which such investment shall be made.

A guardian depositing money in a bank, with the sanction of the Orphans Court, will be protected from loss, though the bank may become insolvent.

To any account between the ward and a surety in his former guardian's bond, the principal in that bond, or the trustee of the principal, he being insolvent, is a necessary party.

Where the Orphans Court sanctions a loan, the guardian will not be liable for loss, except for subsequent neglect in permitting the property to be wasted, or by some act of negligence, or the want of due diligence on his part subsequent to the loan.

The Orphans Court passed an order directing an administrator to retain in his hands $2,000, as a loan to himself, being the amount of a bond which he had executed to the guardian and the ward, and secured by mortgage. HELD—That this order was a legitimate exercise of power by the Orphans Court, because it in effect treats the mortgage from the administrator to the guardian as an investment by the latter.

Accounts settled by an executor or administrator in the Orphans Court, are *prima facie* correct, and it is incumbent on him who disputes them to point out and make manifest the error.

[The original bill in this case was filed on the 10th of July, 1843, by George McNeir, the then guardian of Hezekiah W. Coberth, an infant, against the defendant Basil Shepherd, as administrator of Hezekiah Coberth deceased, the father of said infant, for an account of his administration of the personal estate of said intestate. The bill charges that letters *ad colligendum* were first granted to one George W. Dorsey, who collected and sold for credit and for cash, various portions of the said estate; and that, in 1842, these letters were revoked, and letters of administration were granted to the defendant, who then had a settlement with said collector, the latter paying over to him the money and bonds received from the purchasers, as well as the property unsold; that Shepherd has passed one account as administrator, which is erroneous and imperfect; that the time for settling up his administration has long since passed, but he has refused to pass his final account and pay over to the plaintiff as aforesaid, the property which he admits to be in his hands, but has used and applied it for his own purposes. The bill asks for a discovery of the particulars of said settle-

ment with the collector, an account of his administration, and that he be compelled to pay over to the plaintiff as guardian, the money and property remaining in his hands, and for general relief.

The answer of Shepherd gives a particular account of the settlement referred to, of his administration of the estate, and denies all the charges of misapplication of the property contained in the bill. In accounting for the property in part, he avers, that about the 12th of March, 1842, he, at the suggestion and instance of said George McNeir, who agreed to take the same in payment of so much on account of his ward's estate from respondent, made a loan of $1,000, to William McNeir, the brother of said George, of the money of his intestate, which loan was afterwards approved of by the Orphans Court. That under the authority, and by direction of said Court, he had retained $587 63 of said estate, as a loan to himself on interest, secured by a mortgage on his real and part of his personal estate, to the amount of $2,000; and that the said Court had authorized him to retain the balance of said $2,000 out of the first receipts from the estate of his intestate.

By a supplemental bill, filled on the 13th of January, 1844, this loan of $2,000 to himself, was attacked upon the ground that it was obtained by false representations to said Court of the sufficiency of the security to be given for it, whereas the said Shepherd was utterly unable to pay his debts, and the property included in the mortgage was already incumbered beyond its value, and would not be regarded in the market as good security for one-tenth of said $2,000. That this mortgage was executed without the consent of the plaintiff as guardian, as aforesaid, and was in fact a *devastavit* on the part of said defendant as administrator, as aforesaid. This bill prays for an account of the money received under this mortgage, and that the same may be cancelled.

Shepherd answered this bill, denying its allegations, and averring the entire sufficiency of the property mortgaged, to secure the loan thus made to himself.

Various proceedings were then had in the cause; and on the 10th of October, 1845, the Chancellor passed a decree that the parties "Account of, and concerning the several matters and things, as set forth in the pleadings in the cause," &c.

After this, George McNeir resigned his guardianship, removed out of the State, and William O'Hara, who was one of the sureties on said McNeir's guardian's bond, was appointed guardian in his place; and on the 18th of February, 1850, filed a supplemental bill in the cause, in which, after reciting the previous proceedings in the cause, he avers that the loan of $1,000 to William McNeir, and secured by a mortgage on certain property, was made without the knowledge and consent of George McNeir, the former guardian of the minor, and that if it ever received the approval of the Orphans Court, such approval was procured through fraudulent concealments by Shepherd as to the value of the property given as security for the loan; that the same was wholly inadequate as such security, and has since been sold under prior mortgages which it has failed to pay, so that there will be a loss to the minor of nearly the whole sum, with interest. This bill, then, prays that Shepherd may be compelled to account for this sum, with interest; and in addition to the relief prayed for by the original bills, prays also that the property mortgaged by Shepherd to secure the loan to himself of $2,000, may be decreed to be sold to pay the same; or if this cannot be done, then, that a receiver may be appointed to take charge of it, and for general relief.

The answer of Shepherd to this bill, denies its allegations as to the loan to William McNeir, and insists that it was known to George McNeir, the former guardian, and was actually made with his consent, and at his suggestion, and that it has received the approval of the Orphans Court, without any such false representations or concealment on his part, as charged in the bill. It also denies the regularity of the proceeding, in filing this supplemental bill; and insists that the decree of the 10th of October, 1845, dispensed with the neces-

sity of any such proceedings, though respondent is willing and ready to account, if required by the Court.

The question as to the regularity of filing this supplemental bill was argued by counsel, and the Chancellor thereupon pronounced the following opinion.]

THE CHANCELLOR:

The question discussed in the written arguments of the solicitors, and upon which it appears to be their desire to take the opinion of the Court, relates to the regularity and propriety of filing the supplemental bill of the 18th of February, 1850. But the Chancellor does not see very clearly how the question is brought before him, or by what form of order or decree he can settle it. The case is not submitted upon demurrer, nor upon motion to take the supplemental bill off the file, and therefore, if he were to pass an order directing the bill to be taken off the file, or should declare that no relief can be had under it, the record would represent him as acting *sua sponte*, there being nothing in the proceedings which calls for or would justify the Court in so disposing of the cause. But although the question is submitted in this informal and irregular way, and although I should certainly not feel at liberty to pass an order disposing of the case, unless something was put upon the record by the parties properly presenting the question for the judgment of the Court, I nevertheless am willing so far to comply with the desire of the parties, as to express my opinion upon it.

The objection is that the supplemental bill makes a new case, and is not in aid of that which the Court has already done. The rule appears to be, that a supplemental bill after a decree, must not seek to vary the principle of the decree, but taking the principle of the decree as a basis, seek merely to supply any omissions which there may be in it, or in the proceedings which led to it, so as to enable the Court to give full effect to its decision; 3 *Daniel's Ch. Pr.*, 1662. According to *Mr. Justice Story*, a supplemental bill may be filed as well after as before a decree; and the bill, if after a decree, may

be either in aid of the decree, that it may be carried into full execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; *Story's Eq. Pl., sec.* 338.

Now I do not regard the supplemental bill in this case as making a new case, or as seeking to vary the principle of the decree of the 10th of October, 1845. That decree directed the then guardian of the infant, and the defendant Shepherd to account of and concerning the several matters and things as set forth in the pleadings in the cause. The bill now under consideration does not seek to vary the principle of that decree, nor does it make a new case. It supplies new elements for the account, by introducing matters omitted in the original bill, and not put in issue by it or by the defence made to it; but the principle of the decree, notwithstanding the introduction of the new matter, stands, and the parties are still to account of and concerning the matters in the pleadings mentioned, and these matters in the original and supplemental bill all have reference to the same estate.

The supplemental bill, it is true, in addition to the relief prayed by the original bill, and to the prayer for an account of and concerning the new matter, prays for a sale of certain property, and for a receiver. But the question now under consideration is not, whether upon this bill, and in this cause, this kind of relief may be granted after the decree for an account. The question under examination is, whether a new case is made by this supplemental bill, so that any relief which may be granted upon it, will vary the principle of the decree of October, 1845. If such is the character of the bill, it should not have been filed in this cause without the leave of the Court, because in that case it must be regarded as a supplemental bill in the nature of a bill of review, which requires such leave. But as the Court may, upon the statements made in this bill, grant relief entirely in accordance with the decree already passed, or in other words, as the additional matters introduced merely supply new elements for the account, I can see no reason why the bill should be rejected. And it may also be observed, that though the defendant Shepherd, in his

answer, denies the regularity of the proceedings on the part of the present plaintiff, yet he expresses his willingness to account, as the Court may direct, in the premises. Having expressed these views, the parties will proceed with the cause as to their counsel may seem proper. That O'Hara, the new guardian, may file a supplemental bill, is quite clear; *Story's Eq. Pl., sec.* 340.

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[Further proceedings were then had, and accounts were stated by the Auditor, to which both parties filed exceptions, the nature of which sufficiently appears from the following opinion of the Chancellor, delivered upon the hearing thereof.]

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THE CHANCELLOR:

The material question arising upon the exceptions taken by the parties to the report of the Auditor in this case, relates to the responsibility of the defendant Shepherd, for the loss occasioned by the loan of $1,000 to William McNeir, in May, 1842.

Shepherd was the administrator of Hezekiah Coberth, and in that capacity, on the 13th of May, 1842, he loaned to William McNeir of the money of his intestate, the sum of $1,000, taking as security therefor a mortgage, executed by the borrower and his wife on certain real and personal property in the city of Annapolis, payable twelve months after date, with interest.

This mortgage, though signed by the mortgagors on the 13th of May, was not acknowledged by them before the judge who took their acknowledgment until the 19th of the month, on which latter day, as appears on the face of the instrument, it was assigned by Shepherd, as administrator of the deceased, to George McNeir, as the guardian of his infant son, Hezekiah W. Coberth. The assignment was acknowledged by Shepherd before the same judge, and at the same time that the acknowledgment of the deed was taken, and the whole recorded together on the 11th of the then ensuing October.

A considerable portion of this debt has been lost, the borrower having become insolvent, and the property mortgaged, for reasons which I do not deem it necessary now to advert to, having proved inadequate to pay the money except to a very limited amount.

An effort has been made to throw the loss upon Shepherd, the administrator of the deceased Coberth, upon the ground that George McNeir, the then guardian of his son, never knew of or sanctioned the loan. But the evidence, oral and documentary, to the contrary is so conclusive, that no conceivable doubt can be entertained upon the subject. The deposition of William McNeir, the mortgagor, taken before the Auditor on the 18th of September, 1852, is so full, explicit, and unanswerable, and so completely establishes the knowledge, consent, and co-operation of George McNeir, that the attempt upon this ground to fix the responsibility upon Shepherd utterly fails. This deposition proves, not simply that George McNeir knew of and consented to the loan in question, but that it was by his advice, instigation, and procurement, that it was made. And in addition to this particular evidence, his guardian's account, settled with the Orphans Court on the 9th of May, 1843, recognises and treats this mortgage as a part of the estate of the ward in his hands. To permit him, therefore, or any other person claiming through or under him, or liable for him as surety, to repudiate this transaction, upon the ground that he did not know of or approve it, would be monstrous. It may also be observed in this connexion, that in an account settled with the Orphans Court by William O'Hara, the complainant and present guardian of the minor, on the 13th of May, 1846, this same debt due by William McNeir and wife is treated as a part of the estate of the ward in his hands.

It is urged, however, that this loan from the administrator to William McNeir, even though approved of and sanctioned by the guardian, was totally unauthorized, and the consequences must be visited upon the former; and the 5th section of the 12th sub-ch. of the Act of 1798, ch. 101, is referred to in support of this proposition. The provision in this section

is, that on the guardian's executing the bond required of him, the Orphans Court shall have power to order the property of the ward to be delivered to him. The Court then, in this case, might have ordered Shepherd, the administrator, to deliver to George McNeir, the guardian, the property of the ward. But this, it seems, the administrator did, so far as this mortgage or the money borrowed upon it is concerned, without the order, and the Court, by passing the accounts of the guardian from time to time, in which this mortgage was introduced, and treated as in his hands as part of the estate of his ward, have given their sanction to it as effectually as if they had previously ordered it.

The question in reference to this loan is not whether the administrator could legally dispose of the estate of his intestate, there being a duly qualified guardian to whose ward the surplus belonged, but whether the administrator shall be held responsible for making such a loan, when the guardian himself urges him to make it, and agrees and actually does receive from him the security as a part of the estate of the ward, and the Orphans Court, by repeated acts of recognition, give their entire sanction and approbation to it. This loan, in my view of it from the evidence, was the act of the guardian and not of the administrator, and the Orphans Court having approved of it, the question of the power of the administrator does not arise.

There can be no doubt, I suppose, that the guardian under the direction of the Orphans Court might make such a loan. The authority may be found in various Acts of Assembly. The 13th section of the 12th sub-chapter of the Act of 1798, ch. 101, confers full authority upon the Court, though the bond to be taken for the money loaned should be taken to the ward. This, however, is a matter of form, and could hardly have the effect to vitiate the security, if not followed.

The Act of 1816, ch. 154, is applicable to the proceeds of the sales of the real estate of minors, and gives power to the Orphans Courts to order and direct such proceeds to be invested by their guardians in public stocks, or other permanent

funds, and also declares, in the 7th section, that the investments shall be made in the name of the infant. But this, though a direction very proper to be followed, could not have the effect of avoiding the security, if not pursued. A similar authority is to be found in the 2d section of the Act of 1816, ch. 203, which applies to the proceeds of the sales of leasehold estates sold under the authority of the Orphans Court, or any surplus money belonging to the ward; and, by the 2d section of the Act of 1819, ch. 144, the provisions of the Act of 1816, ch. 154, are extended to the personal estate of minors, so that by these several Acts, the Orphans Courts are empowered to direct the guardians of minors to invest the proceeds of the sales of their real, leasehold, or personal estates in public stocks, or other permanent funds, in the names of their wards. But subsequently, by the 5th section of the Act of 1831, ch. 315, the Orphans Courts are authorized to order any executor or administrator or guardian, either of their own appointment, or a natural or testamentary guardian, of whose bond they may have approved, to bring into Court, or place in bank or in other incorporated stock, or in any other good security, any money or funds received by such executor, administrator, or guardian, and the Court is empowered to direct the manner in which the investment shall be made, the money being at all times subject to the order and control of the Court.

This last law, then, completely covers the present case, because it is thought to be quite clear that the subsequent recognition and approval by the Court of the investment, is fully equivalent to a previous direction to make it. The last sentence, in the opinion of the Court of Appeals in the case of *Jenkins* vs. *Walter*, 8 *G. & J.*, 218, is strong to show that a guardian depositing money in a bank, with the sanction of the Orphans Court, will be protected from loss, though the bank may become insolvent.

I am, therefore, clearly of opinion, that Shepherd, the administrator, who, in making this loan to William McNeir, was but the instrument and agent of George McNeir, the guardian of the infant, cannot be held responsible for the loss, and

that his exception to the account B, in respect of this sum of money, is well taken.

But the counsel of Shepherd insists not only that he should be acquitted from all responsibility on account of this loan, but that in this case, and upon this record, the Court should proceed farther, and determine whether O'Hara, the plaintiff, as surety for George McNeir, the former guardian of the infant, is or is not liable for it.

George McNeir, the principal in the bond, as appears by an agreement filed on the 1st of Oct., 1852, obtained the benefit of the insolvent laws on the 27th of Oct., 1845, after the institution of this suit, and his trustee has not been made a party to the cause. His absence presents an insuperable objection to adjudicating the question as between the ward and the parties to the bond of the first guardian. To any account between the ward and the surety in that bond, the principal, or the trustee of the principal, he being insolvent, is a necessary party.

But independently of this, there is another objection to deciding upon the responsibility of the surety in McNeir's bond, which would not be obviated by bringing all the necessary parties to an account before the Court. It has been already observed, that the Orphans Court having recognised the mortgage by William McNeir and wife to Basil Shepherd, and assigned by him to George McNeir, as guardian of the minor, as a valid security and investment of the money of the ward, the legal effect is the same as if their previous authority for the loan had been obtained; and therefore it results, that if the surety of George McNeir is liable for the loss, it must be because of his subsequent neglect in permitting the property to be wasted, or by some act of negligence, or the want of due diligence on his part subsequent to the loan. But no such question as this is presented by the pleadings, and therefore O'Hara would justly complain of being taken by surprise if the Court was now to undertake to fix the responsibility upon him because of the assumed negligence of the principal in the bond. When that question is brought before the proper tribunal, and fairly pre-

sented by the pleadings, and the parties, after full notice, are heard upon it, it will be time enough to decide it. To do so now, upon this record and in this proceeding, would, in my opinion, be unjust. In the case of *Flickinger* vs. *Hull*, 5 *Gill*, 60, it will be found that the question decided by the Court was distinctly presented by the pleadings.

Before proceeding very briefly to decide upon the other exceptions to the report of the Auditor, it may be proper to say a word in reference to the mortgage from Basil Shepherd to George McNeir, dated the 4th of August, 1843. This mortgage was given to George McNeir as guardian of Hezekiah W. Coberth, and was duly acknowledged and enrolled, and, it is admitted, furnishes an ample security for the money loaned. The Orphans Court, as early as the 9th of August, 1842, had ordered the administrator to loan out, on mortgage on real estate, all sums over and above the amount required to pay the debts of the deceased; and on the 8th of August, 1843, they passed another order, directing Shepherd, administrator of Coberth, to retain in his hands $2,000, being the amount of a bond which is recited in and secured by the mortgage of the 4th of August, 1843. I regard this last order as a legitimate exercise of power by the Orphans Court, because it in effect treats the mortgage from Shepherd to the guardian as an investment by the latter, and falls clearly within the power conferred upon the Courts by the Acts of Assembly before referred to. But as it is admitted that the money retained by Shepherd is well secured, it cannot be very material whether the Orphans Court transcended their power or not.

By the terms of that mortgage, the principal debt thereby secured, was made payable to the guardian on or before the arrival at full age of the ward; and as that period has not yet arrived, and the money is considered to be amply secured, there would seem to be no necessity, and perhaps it would be injurious to compel its payment, by decreeing a foreclosure and sale of the mortgaged premises at this time. Should the mortgagor fail to pay the interest, or the security of the debt for any reason become precarious, it will be in the power of the present

guardian, at any time, to apply to the Court for the proper relief, and liberty will be reserved to him to do so.

It has frequently been decided by the Court of Appeals, that accounts settled by an executor or administrator in the Orphans Court, are to be treated as *prima facie* correct; and it is incumbent on him who disputes them to point out and make manifest the error. The Auditor has proceeded upon this principle, in stating these accounts, and I do not think the complainant has been successful in showing errors in them.

In the account A. Shepherd, the administrator, according to the report of the Auditor, has been charged with the several sums shown by his administration accounts to have been received by him, and with a small additional sum, as interest upon this money claimed to have been retained by him as a loan, and credited with the allowances made to him in the accounts. This account corresponds with the administrator's accounts, except in the charge for interest, and in the correction of some error in addition, and the allowance of commissions, and by it, Shepherd, the administrator, appears to be indebted to the estate in the sum of $1,859 23.

Now, so far as the Auditor has made the accounts in the Orphans Court the basis of his own account, his report is entirely approved of. There does not appear to me to be the slightest ground to impute negligence to the administrator. Neither is there, in my opinion, any just reason for supposing he has not fully and fairly charged himself with all the assets which can come to his hands. Prior to the grant of letters to him, letters *ad colligendum* had been granted to one George W. Dorsey, by whom the personal estate of the deceased was sold; and in the first administration account passed by the administrator, he charged himself with a large amount of bonds and notes, received by him from Dorsey, in December, 1841, which had been taken by the latter from the purchasers of the property. The bonds and notes, or many of them, appear by the receipts filed among the proceedings, to have been placed by the administrator, for collection, in the hands of attorneys, in May, 1842; and by an order of the Orphans Court of Cal-

vert County, passed the 14th of May, 1850, the administrator was directed to discontinue proceedings to collect the claims then remaining uncollected, except three small claims, specified in the order.

In a memorandum at the foot of the account A, the balance ascertained by it to be due from the administrator, is shown to consist—

1st. Of debts received from the Collector still uncollected, ...	$883 96
2d. Balance due on the mortgage of the administrator, bearing interest from the 10th of October, 1851, ...	722 28
3d. Cash, ...	252 99
	$1,859 23

And it is objected, in the sixth exception of the defendant, that the Auditor should not, in his account, have treated these uncollected debts as cash in the hands of the administrator, for which he can be made at this time liable. Seeing, as I have already stated, that the administrator has used due diligence in settling the estate, it certainly would be wrong now to make him responsible for these unrealized claims as cash, and, judging from the memorandum, I am persuaded the auditor did not propose to do so.

There is one point, however, in which the report is not entirely satisfactory. Of the balance stated in account A, to be due from the administrator to the estate of his intestate, the sum of $883 96, as shown by the memorandum, consists of uncollected debts received by the administrator from the collector. The Orphans Court, by their order of the 15th of May, 1850, directed the administrator not to prosecute further the uncollected claims, except those of inconsiderable amount, because they were by the Court regarded as desperate. Now it does not appear by anything on the face of the Auditor's report, or either of the accounts, whether any, and if any, what proportion of this $883 96 consists of claims which the Orphans Court have considered as desperate, and I shall send

the case back to the Auditor, for the purpose of reporting upon this point, and with directions to ascertain how much is now due from the administrator for cash.

When this report comes in, a decree can be passed directing the payment over to the present guardian of the cash, ascertained to be due from the administrator, and providing for the payment of future collections as they are made, and reserving liberty to the complainant to apply to the Court for such order or decree on the mortgage, as the exigencies of the case may require.

FRANK H. STOCKETT, for Complainant.
A. RANDALL, for Defendant.

MARY F. ABERCROMBIE AND OTHERS,
vs.
ROBERT RIDDLE AND OTHERS.

DECEMBER TERM, 1850.

[RULE FOR ASCERTAINING THE PRESENT VALUE OF A LIFE INTEREST.]

THE ancient rule of the Court, fixing the allowance to a woman in lieu of dower, applies in all cases where it becomes necessary to ascertain the present value of a life interest.

This rule having been sanctioned by the Court of Appeals, in the case of *Dorsey* vs. *Smith*, 7 *H. & J.*, 345, the authority of this Court to change it is questionable; and even if it could do so with propriety, the change should be prospective, and not so as to affect an actually depending case.

The Courts have no dispensing power over their rules and long established practice, and the party to whose prejudice an innovation upon the rule of Court is made, has a right to seek redress in the Appellate Court.

This rule has reference to the case of a healthy person, and where the *cestui que vie* is of infirm health, an abatement of the allowance must be made therefor; this is as imperatively required by the rule, as the ratio of distribution prescribed by it.

The *cestui que vie* was fifty-three years of age at the time of sale, and it was proved that her health was infirm, that her constitution never had been robust, and that her lungs were diseased. HELD—that five years was a sufficiently large addition to her age, on account of ill health.

Where stocks are sold before the dividends are declared, the latter pass by the sale, and transfer to the purchaser.

The stocks in this case were sold shortly before the day for declaring dividends had arrived. This sale was made by consent of all parties, including the assignee of the life interest in them. HELD—that the assignee was not entitled to any allowance out of the proceeds of sale, on account of dividends which had accrued up to the day of sale.

The hypothesis, that the value of the stock was enhanced in precise proportion to the amount of the dividends which had accrued up to the day of sale, rests upon a foundation of too much uncertainty, to justify the Court in making it the basis of its judgment.

[In this case, by the consent of all parties interested, a decree was passed for the sale of 650 shares of bank stock, standing in the name of trustees, in trust for the use of Mary F. Abercrombie for life, with remainder to her children. Mrs. Abercrombie had assigned her interest in said stock to the Baltimore Life Insurance Company, which consented to the sale. The sales amounted to $29,438 13, and the cause being referred to the Auditor, he stated four accounts distributing the proceeds, marked A, B, C, D, and E. In account A, he assigned to the Insurance Company, as the assignee of Mrs. Abercrombie's life interest in the stock, one-third of the net proceeds of sale. This allowance was made according to the rule of Court, and the age of the tenant for life, and amounted to $9,362 74. Account B differs only in adding five years to the age of the tenant for life, on account of her infirm health, in making the allowance to her assignee, which by this account amounted to $8,426 46.

Accounts C and D were stated under instructions from the Solicitor of the Insurance Company. In the former (account C), the proportions of the dividends of the stock which had accrued to the day of sale, were assigned to said Company, amounting to $1,006 61, and the allowance for the said life estate was calculated according to the principal sum, of which the income of the stock sold is the interest at six per cent., and amounted by this calculation to $12,292 27. Account D differs from account C, in that the allowance for the life estate was made according to the *Carlisle tables*, taking the income

of the net sales, after deducting the dividends as the basis, and giving 9,761 years purchase thereof as the value of the life estate according to said tables, estimating the present value of the annuity at six per cent. By this estimate, the allowance amounted to $21,135 49. In account E, six per cent. on the net proceeds of sale, according to accounts A and B, was assumed as the proper basis for the annuity, and the value of the life estate was calculated in the same way as in account D. By this estimate, the allowance amounted to $16,450 12.

The Auditor submitted that all these accounts were erroneous except account B. It was proved that Mrs. Abercrombie, at the time of the sale, was fifty-three years of age; that her health was very precarious and infirm; that from her infancy her constitution was never robust, and that her lungs were diseased, and she had had several hemorrhages. A deposition of John F. James, the Actuary of the Girard Life Insurance Company of Philadelphia, to the effect that the Carlisle tables were used by all, or very nearly all such companies in this country, and that they furnish a good business criterion, when used as the basis of transactions was also filed in the cause.

The Insurance Company excepted to the report and accounts of the Auditor: 1st. Because accounts A, B, and C, in making allowance for the life interest, do not base it upon the actual probabilities of life at the age of the *cestui que vie*, as ascertained by the best authorities. 2d. Because a deduction is made in account B, on account of the ill health of the *cestui que vie*. 3d. That no allowance is made in the first three accounts to the Company, for the proportionate part of the dividends which had accrued up to the day of sale.

The complainants also excepted, because in account B a sufficient deduction was not made from the value of the life interest of Mrs. Abercrombie, on account of the bad state and condition of her health, they insisting that the Auditor ought to have added *ten* years or more, instead of *five*, to her age. They also excepted to the computation of such allowance by the Carlisle tables.

These exceptions having been set down for hearing, and having been argued by the solicitors of the respective parties, the Chancellor delivered the following opinion thereon.]

THE CHANCELLOR:

The first and most important of the questions raised in this case, by the exceptions of the Baltimore Life Insurance Company, to the report of the Auditor, and upon which I have had the advantage of hearing a very good argument on both sides, was raised and discussed in the case of *Peyton* vs. *Ayers*, recently decided by this Court, and reported in 2 *Md. Chancery Decisions*, 64.

In that case, which was brought before me on two occasions, I expressed the opinion founded upon the case of *Dorsey* vs. *Smith*, 7 *H. & J.*, 345, that the ancient rule of the Court, adopted for the purpose of fixing the allowance to a woman in lieu of dower, was proper to be followed in all cases, when it became necessary to ascertain the present value of a life interest, and when the case was last under consideration, the rule was not applied, because the particular point to be decided did not necessarily present the question. But in disposing of the case of *Peyton* vs. *Ayers*, upon a ground which relieved me from the obligation to apply a rule, with which I think there is some reason to be dissatisfied, I most distinctly recognised its controlling power over this Court so long, at least, as the rule remains unrescinded.

I then said: "But although the Court of Appeals might, and I think would at this day, establish a different rule for ascertaining the value of life annuities, I certainly do not feel myself at liberty to do so. So long as the case of *Dorsey* vs. *Smith* stands unreversed and unqualified by the high tribunal which decided it, it would be, it appears to me, unbecoming in this Court, and inconsistent with that subordination to superior authority so necessary to the orderly and harmonious administration of justice, to adopt a different principle." 2 *Md. Ch. Decisions*, 70, 71.

The rule of this Court, which the Court of Appeals adopted

by analogy in *Dorsey* vs. *Smith*, was established as far back as 1804, and though perhaps occasionally complained of, has never, so far as I know, been deviated from to the present day. It is therefore entitled to great respect, and though as a mere rule of this Court it might, perhaps, be altered, upon the evidence which subsequent experience and observation have furnished, upon the principle that the authority which made it is competent to alter it, yet I apprehend after it has received the sanction of the Superior Court, the authority so to deal with it by this Court becomes much more questionable, or at all events, it should be careful to act only upon the fullest evidence.

But even if this Court could with propriety change the rule, it appears to me the change should be prospective, because it may reasonably be supposed that in transactions like the present, the parties have shaped their conduct with some reference to the existing rule. I do not mean to be understood as saying, that the Insurance Company, in buying or selling annuities, is governed by the rule, because it appears they have adopted tables for their guide, which do not conform with the rule, subject of course to be varied according to circumstances; but it is by no means an extravagant supposition, that when this Company, or any other holder of a life estate, or annuity for life, consents to a sale of such interest by *the decree of this Court*, that regard is had to the Chancery rule, and that some of the parties, at least, to the cause would be taken by surprise, if that rule should be set aside and another substituted for it.

In the present case, it is said the sale of the property was sought by the parties entitled in remainder, and by Mrs. Abercrombie, for their own accommodation; and the bill does allege that a sale will be for their benefit, and that the Insurance Company is willing that the property (consisting of bank stock) should be sold, the Company receiving of the proceeds the value of the life interest of Mrs. Abercrombie, of which they were the purchasers.

Now it may very well be, that these plaintiffs considered it

would be for their advantage to sell the property, dividing the proceeds according to the rule of the Court, when they would have taken a very different view of the matter, if the proceeds were to be distributed according to another rule, of which, in view of the established law of this Court, they could not possibly have had the slightest conception. And the result of the various accounts stated by the Auditor in this case, showing how seriously and injuriously their rights will be affected, if the rule is departed from, may well create a doubt whether, if they could have anticipated any such course, they would have asked for a sale.

It has been observed, that though this Court may possess the power to change prospectively the rule regulating the proportions in which the proceeds of property sold under its authority shall be distributed between the dowress and heir-at-law, or between the holder of the life estate and those entitled in remainder, its authority to make such alteration with regard to an actually depending case, when it may well be supposed the parties have had the rule in contemplation, is liable to very grave doubts. The case of *Wall* vs. *Wall*, 2 *H. & G.*, 79, is well calculated to confirm these doubts, it having been there decided that the Courts have no dispensing power over their rules and long-established practice, and that a party to whose prejudice an innovation upon the rule of the Court is made, has a right to seek redress in the Appellate Court.

I am, therefore, of opinion, that the first exception of the Insurance Company cannot be maintained, and that the rule of the Court applies to and must govern this cause.

And as it is thought the distribution must be made in conformity with the rule, and the rule has no reference to the case of a healthy person, it follows that some abatement must be made on account of the delicate health of Mrs. Mary F. Abercrombie, the *cestui que vie*. This, it appears to me, is as imperatively required by the rule as the ratio of distribution prescribed by it; and hence I think the second exception of the Insurance Company is not well taken.

The Auditor, in his account B, has added five years to the

age of Mrs. Abercrombie because of her infirm health, and this is excepted to by the complainants as insufficient, her precarious condition, as they insist, requiring a much larger addition to her age. According to a table, incorporated in the very elaborate and learned opinion of the late Chancellor, in *Williams's Case*, 3 *Bland*, 238, the expectation of life of a person fifty-three years of age, which was the age of Mrs. Abercrombie at the period of the sale, is within a fraction of fifteen years, and the addition of five years to her age on account of ill health, reduces the expectation to a little over thirteen years. The chancery rule is supposed to have been constructed upon this table, and the question is, whether the Auditor has made a sufficiently large addition?

In the very nature of things it is absolutely impossible to establish a fixed standard upon a subject like this. Every case must depend upon its own peculiar circumstances, and with all the lights which science can shed upon it, we can only hope to approximate to that which the future alone will reveal. Evidence has been taken in this case, which certainly does show that the *cestui que vie* is in infirm health, but we have not the benefit of the opinions of her physician with regard to the probable duration of her life. Even with the aid of such an opinion, we might wander far from the true mark, but without it our conjectures are much more likely to lead us astray. Certain it is, as appears by some of the depositions, that the disease of Mrs. Abercrombie, though alarming, and though, judging from her frail condition, her death is an event which cannot long be deferred, is not likely, if we may judge from the past, to bring her existence to a very speedy conclusion. Her constitution seems to have resisted it for many years, and there is nothing in the evidence from which it can be inferred that it is now so broken down as to be incapable of yet further resistance. The hope can scarcely be indulged that she will live beyond or perhaps attain the age usually allotted to human existence, but the presence of the disorder which forbids this hope, may probably furnish some security that her life will not be brought to a very speedy termination, as it

seems to be well established that the human system, when laboring under a chronic affection, is measurably exempt from those acute and rapid attacks before which the vital principle rapidly gives way. Judging, therefore, from all before me, and being painfully conscious that I am to a great extent groping in the dark, I am persuaded that by approving the conclusion to which the Auditor has come upon this question, I am quite as, and perhaps more, likely to do justice to the parties than by adopting any other course. Considering the long series of years through which Mrs. Abercrombie's constitution has maintained her against the approaches of the disease which is gradually but slowly wearing away her life, I see no reason to suppose it may not yet be protracted for the period assumed by the Auditor, and therefore shall overrule the exception of the complainant in this respect.

The remaining question arises upon the third exception of the Insurance Company to the accounts reported by the Auditor, marked A, B, and E, because they do not give to the Company, as assignee of Mrs. Abercrombie, a proportionate part of the dividends on the stock sold, which had accrued up to the day of sale.

The stocks, it appears, were sold some short time before the declaration of the dividends, and it is of course conceded that the title to the dividends subsequently declared passed by the sale and transfer of the shares to the purchaser. There cannot, therefore, be any claim to a proportion of the dividends *as such*, nor has any such claim been asserted in the argument. The exception is pressed, not upon the ground that the Company is entitled to any part of the dividend received by the owner of the stock when it was declared, but upon the hypothesis that as the value of the stock must have been enhanced by the near approach of the period when a dividend might be expected, it is reasonable to presume its price in the market was improved in proportion to such enhancement in the value. That is, it is supposed the purchaser gave not only the value of the stock, irrespective of the dividend, but in addition thereto, the proportion of dividends which had accrued to the

day of sale. It appears to me, however, that this hypothesis rests upon a foundation of too much uncertainty to justify the Court in making it the basis of its judgment. The price of stocks, and especially of bank stock, is affected by too many causes to enable any one to say that its depression or elevation is attributable to any particular cause. Even the stock of the General Government, and of the States, and the obligations of the great incorporated companies, bearing a fixed rate of interest, do not invariably appreciate in price as dividend day approaches, or at least the appreciation is not in exact proportion to the interest which from day to day is accruing upon it. The condition of the money market frequently exerts an influence upon the price of such securities, powerful to countervail the effects of an approaching dividend, and therefore even with reference to these securities, it would frequently be unsafe to assume that the price paid for them at any given period was augmented in exact proportion to the interest which had accrued upon them to such period.

But if this be so with regard to stocks bearing a *fixed* rate of interest, when the amount accrued can be calculated with absolute certainty, how much more cautious should the Court be in saying, that stocks which have no determinate rate of interest have appreciated in precise proportion to the dividend which had accrued upon them at the period of the sale, when a dividend is subsequently declared? In this case the Insurance Company, the owner of the stocks for the life of Mrs. Abercrombie, might have refused to consent to the sale until after the usual dividend day, and then, of course, they would have received it. But this delay would have exposed the Company to some danger, and it may be that this consideration had some influence in inducing them to accede promptly to the application for a sale.

The solicitor of the Company has urged, in arguing this exception, that portion of the bill which says it will be for the benefit of Mrs. Abercrombie and her children that the stock should be sold, "and the proceeds divided among the parties in an equitable manner." This, it is said, may fairly be construed

as applying to the dividends, and to mean that the party entitled to them shall, out of the proceeds of the sale of the stock, receive that portion of the dividends which had then accrued. I am persuaded, however, that this view of the subject was not within the contemplation of the complainants when the bill was filed. When they spoke of an equitable partition of the proceeds of the sale, they meant that the Insurance Company should receive a fair equivalent for the life estate of Mrs. Abercrombie, but I am very confident they had no reference whatever to dividends of the stock then or thereafter to accrue. They could not have anticipated *when* the sale would be made, and as the Company had the power to control that event, their rights should not be prejudiced by the fact that it actually took place within a short period of the dividend.

No case has been cited which, in its material features, is analogous to this. In the case of *Wiegal* vs. *Brome*, 9 *Eng. Cond. Ch. Rep.*, 188, the fund out of which the annuities were payable was actually received by the trustee, and it was decided, that as the period fixed by the testator for the termination of the annuities occurred after the last half-yearly day of payment, that the annuitant was entitled to a proportional part, from such day to the time when the annuity was to cease altogether. But here, no time was definitely fixed when the dividends which might be declared upon these stocks should cease to be payable to the Insurance Company. And in the very nature of things, the amount of the dividends was always more or less conjectural, until actually declared. In *Wiegal* vs. *Brome*, the time for which the annuity was to be paid was fixed, and the rents upon which it was charged, were received by the trustee. But in this case, the title of the Company to receive the dividends was liable to be defeated at any time, by the demise of Mrs. Abercrombie, the amount uncertain, and, by the act of the Company itself, the right to this contingent profit upon the stock was transferred to third persons. The Company does not, and can not claim the dividends, or a proportion of them, upon the ground that they have been, *eo no-*

mine, received by the trustee. Their claim in this regard rests and has been urged upon the assumption, that the stock sold for so much more as that proportion of the dividends which had then accrued bore to the whole amount thereof, when subsequently declared; an assumption which, I think, cannot safely be made, in view of the numerous causes, more or less fictitious and speculative, which influence the price of such securities.

The case of *Ex parte Rutledge*, *Harp. Eq. Rep.*, 65, resembles the present case in this, that it was a question as to the apportionment of the dividends on bank stock between the donee for life, who died a few days before a semi-annual dividend was declared, and the party entitled in remainder. The Court there decided that the dividend should be apportioned, and the amount which had accrued at the donee's death should be paid to his executor. But in that case the dividend, *as such*, was actually received by the party who was to make the apportionment. There was no sale of the stock, before the dividend was declared, by consent of the parties, and the Court was not consequently required to act upon the assumption that the purchaser gave precisely so much more for it as the dividend then accrued amounted to. That circumstance, as I conceive, separates that case from this by a broad and clearly defined line. The Court there was acting upon a reality. The dividend was in hand, and it was thought, and I think justly thought, that the interposition of Providence, in terminating the existence of the donee for life, a few days before its declaration, should not deprive his representative of that proportion which had accrued in his lifetime.

I have read with attention the deposition of Mr. John F. James, and assuming that it would be proper, in a case circumstanced like the present, to change the existing rule, I should doubt very much the authority of this Court to do so upon the facts therein stated. It seems to me that the ancient, steadily adhered to, and highly sanctioned rule of this Court, should not be varied, unless demonstrated to be erroneous by more conclusive evidence than is furnished by this deposition. This remark is made without intending the slightest disrespect to Mr.

James, who, I have no doubt, is a gentleman of the highest respectability, but because the facts deposed to by him are not, in my opinion, of that character which would warrant the Court in disregarding its own rule, and establishing another materially affecting the rights of property.

My opinion, therefore, is, that the account B, reported by the Auditor, is correct, and I shall pass an order ratifying it.

GRAFTON L. DULANY, for the Complainants.
THOS. DONALDSON, for the Insurance Company.

EDWARD REYNOLDS AND OTHERS,
vs.
MARGARETTA HOWARD AND EMILY HOWARD.
} DECEMBER TERM, 1850.

[CHANCERY PRACTICE—INJUNCTION—EXTENT OF JURISDICTION OF THIS COURT.]

AN injunction to restrain proceedings at law for the collection of money due upon notes of hand, given to the vendors for the purchase-money of land, cannot issue without an injunction bond; and where the bill asks for such injunction upon the ground of credits claimed, the amount of such credits should appear, and the balance brought into Court, to be paid to the vendors.

Where such a bill was filed against two only of the five vendors, and the only ground of complaint is the refusal to allow such credits, it cannot be regarded as a bill for the specific performance of the contract of purchase, and the want of necessary parties would forbid the granting of such relief, even if the evidence showed the complainants entitled to it.

The amount of such credits claimed being less than five pounds, it is not sufficiently large to sustain the jurisdiction of this Court.

By the Act of 1715, ch. 41, this Court cannot hear, determine, or give relief in any cause, matter, or thing, wherein the original debt or damages does not amount to 1201 pounds of tobacco, or five pounds and one penny in money.

[The complainants in this case, in March, 1847, purchased

of the defendants, and three other parties, certain lands, and took a bond of conveyance therefor, signed by all the parties. They paid the purchase-money as it came due, excepting the last two notes for $300 each, due to the defendants respectively, which they refused to pay, upon the ground that certain taxes upon the lands, for the years 1845 and 1846, had not been paid by the defendants; and the present bill was filed for an injunction to restrain the defendants from proceeding at law to collect these notes. Upon this bill the Chancellor made the following remarks.]

THE CHANCELLOR:

An injunction cannot issue upon this bill without a bond. The opinion of the Court of Appeals, in the case of *Alexander* vs. *Ghiselin*, in 5 *Gill*, 188, establishes the rule in all such cases. The bill does not state how much will remain due after deducting the taxes, for which a credit is claimed. This should appear, and this balance ought to be brought into Court, to be paid to the defendants, the vendors of the land.

[An amended bill was then filed, setting forth the amount of the taxes for which a credit was claimed; and the amount of the notes, with interest, was paid into Court. An injunction was then granted, as prayed, upon the filing of a bond, and after answers, proof, and other proceedings, the case was set down for final hearing, when the Chancellor delivered the following opinion, in which the facts of the case are sufficiently stated.]

THE CHANCELLOR:

If this could, upon any fair construction of its statements, be regarded as a bill for the specific performance of the contract of purchase, mentioned in the bond of conveyance filed as an exhibit, there could, of course, be no doubt of the jurisdiction of this Court to grant that relief, and it would certainly be quite willing to do so, provided the facts and circumstances of the case made it proper.

But, according to my understanding, the bill cannot be regarded as one of that description, and, I am persuaded, was not originally so considered by the complainants' solicitor, or else he would have brought before the Court the parties necessary to enable it to dispense the relief proper to such a bill. The bond of conveyance which contains the evidence of the contract of sale, and which binds the obligees to convey the land upon the payment of the purchase-money, is signed by five parties, and yet but two of them are made parties to this bill. The Court, therefore, would not, even if the complainants had shown themselves entitled to such relief, be able, for the want of necessary parties, to grant it. A conveyance, of course, could not be decreed unless all the vendors were before the Court; and there can, I think, be little doubt they would have been brought here, if the complainants had framed their bill with a view to that relief. The only ground of complaint, presented by this bill, is the non-payment by the defendants, Margaretta Howard and Emily Howard, of their proportions of certain taxes, alleged to be liens upon the land; and the only relief sought by it is, that they shall be restrained by injunction from proceeding at law to enforce payment of the two last notes, given to each of them for the purchase-money, until the taxes are paid. It is true, there is a prayer for general relief; but neither the case made by the bill, nor the parties before the Court, will enable it to decree a specific performance of the contract of purchase. And the question, therefore, is whether the amount in controversy is sufficiently large to sustain the jurisdiction of this Court. Upon examining the evidence, I am of opinion it is not. The Act of 1715, ch. 41, declares, that this Court "shall not hear, determine, or give relief in any cause, matter, or thing, wherein the original debt, or damages, doth not amount to 1201 pounds of tobacco, or five pounds and one penny in money." In this case, the only matter in controversy is less than five pounds, as plainly appears from the extract from the assessment book of Baltimore County, which, by the agreement of the parties, is to be received as evidence of the matters therein contained. The

jurisdiction of the Court cannot, I think, be sustained, and the bill must be dismissed and the injunction dissolved. But I shall dismiss it without costs, because there are circumstances proved in the cause showing, I think, very clearly that there has been a want of that spirit of accommodation, and disposition to adjust this small matter amicably, which would have prevented all controversy, and because the complainants, in regard to the amount of the taxes, have been misled by the error or carelessness of the collector.

GEORGE H. WILLIAMS, for Complainants.
LEVIN GALE, for Defendant.

THE NEPTUNE INSURANCE COMPANY,
vs.
REBECCA DORSEY.
} DECEMBER TERM, 1850.

[RIGHT OF SURETY TO SUBSTITUTION—TRUSTEES' COMMISSION.]

A MORTGAGE was assigned, and the equity of redemption conveyed by the mortgagor to D., who created liens upon the property by way of mortgage, and then executed and passed his promissory notes for the interest due on the original mortgage to the assignee thereof, with S. as endorser. These notes were paid at maturity by S., but no assignment of the mortgage was ever made to him, and the property was afterwards sold. HELD, that S. could not be subrogated to the rights of the original mortgagee as to the amount so paid by him.

If by the payment of the money by S. an assignment *pro tanto* was effected by operation of law, he would, to all purposes and every effect, have been placed upon a footing of equality with the original mortgagee, and equally entitled with him to participate in the common security.

The Act of 1763, ch. 23, only confers the right to make the assignment authorized by it, upon the original creditor, and not upon the assignee of such creditor.

It is a clearly established principle in this State, that a surety, on paying the debt of the principal, has a right in a Court of Equity, to call upon the creditor for an assignment of the claim against the principal, and all liens which he has given the creditor.

But a surety can neither at law nor in equity call for such assignment, or

be clothed by mere operation of law and upon principles of equity with the rights of an assignee, unless he has paid the *entire debt* of the creditor: a *pro tanto* assignment will not be allowed.

The trustees for the sale of mortgaged property postponed the sale, at the request of the owner of the equity of redemption, who stipulated that they should be allowed commissions and expenses for such postponed sale. —HELD, that this was a *personal* contract with the party, and gave the trustees no right to claim such commission out of the proceeds of sale.

[The facts of the case are fully stated in the Chancellor's opinion.]

THE CHANCELLOR:

The principal question in this case, which is brought before the Court upon exceptions to the report of the Auditor, relates to the right of claim No. 12 to be substituted to the amount thereof in the place of No. 1, which appears to be a prior lien upon the proceeds of the property sold under the decree of this Court.

Claim No. 1 is founded upon the mortgage of the property in question, by Rebecca Dorsey to the Neptune Insurance Company, bearing date on the 15th of April, 1843, to secure payment of the sum of $8,000, and which, by the assignment of the mortgagee, has become the property of the Baltimore Life Insurance Company. The proceedings show that after the execution of this mortgage, to wit: on the 15th of February, 1844, Rebecca Dorsey, the mortgagor, for the consideration of five dollars, conveyed by deed to Edward H. Dorsey, her equity of redemption in the mortgaged premises, subject to the mortgage debt; and that on the 9th of March, of the same year, Edward H. Dorsey and his wife conveyed the same property to John Patterson, to secure the payment of the sum of $3,574 28, due by him to Patterson, on a promissory note dated on the day of the date of the mortgage, payable in five years, and for the interest on said sum, for which interest notes were also executed. This mortgage, upon its face, was made subject to the preceding mortgage given by Rebecca Dorsey to the Neptune Insurance Company. The mortgage to Patterson

was subsequently assigned in part to John Glenn; and the claims of Mr. Glenn and Mr. Patterson, formed therein, are designated in the report of the Auditor as claims Nos. 4 and 5.

It also appears that on the 9th of May, 1844, Edward H. Dorsey, the assignee of the equity of redemption of Rebecca Dorsey, and the mortgagor in the mortgage to Patterson, passed to the Baltimore Life Insurance Company, the assignee of the Neptune Insurance Company, his three promissory notes endorsed by James Swann, for $443 55, payable respectively at ninety days, six months, and one year, and being for the amount of interest due on the mortgage, to the 9th of May, 1845. That these notes were, at maturity, paid to the Life Insurance Company by said Swann, and the amount thereof, with interest, having been repaid to Mr. Swann by David Stewart, Esq., one of the trustees for the sale of the property under the decree of this Court, the claim in question, designated as No. 12, has been stated by the Auditor as due him.

The fact that these notes were given to the Baltimore Life Insurance Company, on account of interest due on the mortgage of Rebecca Dorsey to the Neptune Insurance Company, and that they were at their maturity paid by Mr. Swann to the Baltimore Life Insurance Company, the assignee of the said mortgage, and that the money has since been repaid to Mr. Swann by Mr. Stewart, appears by the depositions of Mr. Swann, and Mr. Donaldson, the President of the Insurance Company, and I state these as facts in the cause, upon the assumption that the depositions are admissible in evidence, though the competency of Mr. Swann as a witness is excepted to.

But assuming the facts to be established by competent testimony, the question arises whether Mr. Swann or Mr. Stewart, who has paid him the claim, can, to the extent of the sum so paid, be permitted to stand in the place of the prior mortgagee, and be subrogated to his rights?

No assignment, in fact, was made by the Baltimore Life Insurance Company to Mr. Swann, upon the payment of the money by him or since, and if he is entitled to occupy the

position of an assignee *pro tanto*, it must be by operation of law merely, or upon principles of equity established to effectuate the purposes of justice. But if, upon paying this money, Mr. Swann became, upon principles of equity, subrogated to the rights of the Insurance Company for the amount so paid, he must for all purposes, and to every effect, have been placed upon a footing of equality with the Company, and in case the mortgaged premises had not sold for enough to pay the entire mortgage debt, the loss would have fallen in proportion upon the Company and Mr. Swann. The argument is, that upon paying this money, Swann, upon general principles of equity, and independent of the statutory provisions upon the subject, became entitled to an assignment of the security *pro tanto*, and to be substituted to the rights of the Company, to whom the payment was made. Not that he thereby acquired a right to come in next after the Company, but to stand in the shoes of the Company, and with like effect, as if they had executed to him a formal assignment of so much of the mortgage, which would of course have placed them on a footing of perfect equality; and in the case of deficiency in the security, the loss would have been shared by them in proportion to the amount due each.

But can it be contended that such is the effect in equity of this payment by Mr. Swann? For unless it be so, I can conceive of no principle upon which he can maintain the position now assumed for him. There seems to me no middle ground. If by the payment of the money an assignment was effected by operation of law, it was effected then immediately upon the payment, and at once placed the party paying alongside of the party paid, and equally entitled with him to participate in the common security. Such, however, I am very confident was not within the contemplation of the parties, and would not be in accordance with the principles of justice. It never was, or could have been intended by these parties, that by paying this money Mr. Swann should be lifted to a level with the assignee of the mortgage, and if loss occurred, it should fall in proportion upon him as such assignee.

It is very clear, that the right of substitution claimed for Mr. Swann can receive no aid from the Act of 1763, ch. 23; that Act, as was observed by the Court of Appeals, in the case of *Creager* vs. *Brengle*, 5 *H. & J.*, 234, only conferring the right to make the assignment authorized by it upon the original creditor, and not upon the assignee of such creditor, and therefore, if the right claimed in this case can be admitted, it must rest upon the principle of equity, that a surety on paying the debt of the principal debtor, has a right in a Court of Chancery to call on the creditor for an assignment of the claim against the principal, and all liens which he has given the creditor, a principle too firmly established in this State to be for a moment called in question.

The payment by Mr. Swann in this case was not to the original creditor, the Neptune Insurance Company, but to the Baltimore Life Insurance Company, the assignee of the first-named Company, and the Life Insurance Company could not, if disposed to do so, have made an assignment under the Act of 1763, ch. 23, as was expressly adjudged by the Court of Appeals in the case referred to.

And it appears to me to be equally well settled in this State, that even when the payment is made by the surety to the original creditor, an assignment under the Act of the Legislature cannot be demanded, unless the payment be *in full.* This was decided by the Court of Appeals, in the case of *Hollingsworth* vs. *Floyd*, 2 *H. & G.*, 87; and it was in the same case also declared to be the settled doctrine in equity, that a surety paying the *entire debt* had a right in Chancery to an assignment of the judgment against the principal debtor, and of all liens which the principal had given the creditor. And it was further said by the Court in this last case, that "it would not subserve the ends of justice to consider the assignment of an entire debt to a surety, as effected by operation of law, where he had paid but a part of it, and still owed a balance to the creditor, and this Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which could

only be to give distinct interests in the same debt to both creditor and surety."

If the doctrine announced in the case referred to, be applicable to this, it puts an end to this part of the controversy, because Mr. Swann has paid but a very small portion of the debt; and if he is, upon the principles of equity, entitled to an assignment *pro tanto* of the mortgage, we have the very anomaly which the Court of Appeals said they would not countenance.

It is said, however, that the case of *Hollingsworth* vs. *Floyd* was a case at law, and that we are in equity unfettered by those technical rules which sometimes are too stubborn to yield to considerations of justice and right. But though *Hollingsworth* vs. *Floyd* was a case at law, it came before the Court upon a motion to quash an execution; and it is believed to be well settled, that upon such motions, the Courts exercise a *quasi* equitable jurisdiction, and feel themselves less restrained by technical rules, than when exerting their ordinary powers. At all events, it is, I think, impossible to read the opinion of the Court, in that cause, and not come to the conclusion, that neither at law nor in equity, could a surety call for an assignment from the creditor, or be clothed, by mere operation of law and upon principles of equity, with the rights of an assignee, unless he had paid the *entire debt*, and, of course, had wholly satisfied the claim of the creditor.

The doctrine of *Lidderdale* vs. *Robinson*, 2 *Brock. Rep.*, 160, is in perfect harmony with that which prevails in this State. It certainly does not carry it any further, unless it may be supposed to be carried further by the determination, that the same rule applied as between co-sureties. So far as the law of principal and surety is concerned, and the rights of the latter to be substituted to every equitable intent and purpose in the place of the creditor whose debts he has discharged, the principles of the case of *Lidderdale* vs. *Robinson* are precisely those which obtain in our Courts.

But another objection, and, as it appears to me, one of great force, is made to this right of substitution, claimed for Mr.

Swann. This gentleman was in no way connected with the original transaction between Rebecca Dorsey and the Neptune Insurance Company. But after she had conveyed her equity of redemption to Edward H. Dorsey, Mr. Swann endorsed certain notes, given by the latter to the assignee of the Neptune Insurance Company, for interest due upon the mortgage. The remarks of *Chief Justice Marshall*, in the case of the *Bank of the United States* vs. *Winston's Ex'or*, 2 *Brock. Rep.*, 254, are well worthy of attention in considering this question; and certainly are calculated to awaken serious doubts with reference to the rights of a party, not bound by the original security, to be substituted to all the rights of the original creditor upon paying him the debt. And these doubts are strengthened, in this case, by the circumstance that Mr. Swann never did become the surety of the original principal debtor, Rebecca Dorsey, but of Edward H. Dorsey, the assignee of the equity of redemption.

But, it is said, the second mortgagee is in no way injured by what Swann did, or by what is now claimed for him; that the whole amount of the prior incumbrance, principal and interest, must be paid before the second mortgage can be let in; and this, of course, is quite true. But it is equally true, that the interposition of Mr. Swann, in paying this money, has turned interest into principal, to the manifest prejudice of the second mortgagee, as upon examining the Auditor's statement of claims plainly appears. The amount paid by Mr. Swann, as interest, amounted to $443 55; and this sum is now swelled, by the interest which has accrued upon it, to upwards of $560. It is most obvious, that a repetition of this operation, from time to time for a series of years, as interest upon the mortgage debt falls in arrear, would most seriously affect the junior incumbrancer, and might, in process of time, exclude him altogether from the benefit of the security, or, at all events, very much impair his right under it.

I am, therefore, of opinion, that the right of substitution claimed cannot be maintained; and that the exception of Mr. Glenn to this claim, No. 12, must be ruled good. The holder

of this claim must take rank, as a simple contract creditor only, and be treated accordingly.

The next question relates to the allowance for commission, as claimed by the trustees, upon the proceeds of the sale, which was to have taken place on the 15th of October, 1846; but which was postponed, at the instance of Edward H. Dorsey, and concurred in by the opposite party, according to the statement in the trustees' report (this opposite party being the Baltimore Life Insurance Company). "And the trustees further report, that upon the occasion of this postponement, the said Edward H. Dorsey entered into a stipulation with your trustees, for payment of commissions and expenses."

If there remained a surplus of the proceeds of sale, after paying all claims against the mortgaged property, which surplus would belong to Dorsey, it might be a question, how far he would be bound by his stipulation with the trustees to pay their commissions for postponing the sale, though such engagements, under ordinary circumstances, should not, I think, be regarded with a very favorable eye. But as there is no surplus, the proceeds of sale, on the contrary, being altogether insufficient to pay the claims of creditors who come in after the Baltimore Life Insurance Company, it appears to me quite plain, the claim cannot be allowed. If allowed at all, it must be at the expense of parties, who neither approved or knew of the stipulation; and those who did know and approved of it, bear no part of the burden, the claim of the Insurance Company being paid in full, and there being nothing left for Dorsey, whether the commission is allowed or not.

There is, moreover, another reason, which is conclusive against the right of the trustees to have this commission paid out of the proceeds of sale. Their contract was with Edward H. Dorsey, *personally*. The report states, that "the said Edward entered into a stipulation with your trustees for payment of commissions and expenses." The contract was not that they should be paid *out of the proceeds of sale*, but that Dorsey should pay; and to Dorsey, it seems to me, they must look for payment. If it had been intended that the commis-

sion should come out of the proceeds of the sales, the contract should have been entered into by the Insurance Company, the creditor, as well as by Dorsey, because, in the event of a deficiency, the loss would have fallen upon the creditor; and, therefore, the fact, that it was the stipulation of Dorsey alone, is strong to show, that he, and he alone, was to pay it.

I am, therefore, of opinion, that no commissions can be allowed upon the postponed sale. The trustees are, of course, entitled to commissions, according to the rule of the Court, upon the proceeds of sale actually made, and to all the usual expenses attending it, and the preceding attempt to sell, which was ineffectual.

It is believed that the decision of these two questions, will enable the Auditor to state an account, finally settling the whole case.

DONALDSON and MAYER, for Swann, and the Trustees.
R. W. GILL, for Glenn, and Patterson.

[Separate appeals were taken by Swann, and the trustees, from the order of the Chancellor, passed in accordance with the above opinion. Upon the appeal of the trustees, the order disallowing their claim has been affirmed. The appeal of Swann, is still pending.]

ROBERT S. HOLLINS, ADMINISTRATOR OF JOHN HOLLINS,
vs.
CHARLES F. MAYER, AND OTHERS.

MARCH TERM, 1851.

[VALIDITY OF ASSIGNMENT IN FAVOR OF CREDITORS—CONSTRUCTION OF DEEDS.]

A DEED conveying property, real and personal, in trust, to sell and apply the proceeds, 1st, to the payment of costs and commissions, and 2d, to the full payment of such creditors, named in an annexed schedule, as assent and release within a fixed time, "if the fund be sufficient for that purpose, and the balance, if any," to one of the grantors and his representatives, "but ratably and proportionably, according to the amount of the claims of each of said creditors, if the fund be insufficient to pay the whole;" *provided*, the shares of the non-assenting creditors "shall not be distributed among the others," but shall be held by the trustees, "subject to the future order and control of" the said grantor, is valid.

The fund not proving sufficient to pay the assenting creditors in full, they can only receive dividends, in the proportion that their claims bear to the whole amount of claims specified in the schedule, and the surplus must be paid to the grantor.

The non-assenting creditors cannot claim this surplus, because they would then receive the same benefit under the deed as the assenting creditors, without complying with its terms, which would destroy a material stipulation of the deed, and defeat one of the principal inducements to its execution.

[A deed of trust was executed on the 15th of January, 1823, by John Hollins, Michael McBlair, and John Smith Hollins, conveying to certain trustees certain real and personal property, consisting of two pieces of land, situated in the city of Baltimore, and "all and singular the stocks, chattels, effects, claims, debts, and sums of money" specified in two schedules annexed to the deed, *in trust*, to sell and collect the same, and apply the money arising therefrom, in the *first* place, to the payment of the costs and expenses attending the execution of the trust, and a commission of twelve per cent. to the trustees, and in the *next* place, "to distribute and divide the whole of the residue of such moneys, or so much thereof as may be neces-

sary, to and amongst such of the creditors" of the grantors, named in another schedule annexed to the deed, "as shall, within six months from the date" thereof, "signify their assent to the terms of this deed, and execute and deliver to the" grantors "a full and final release and discharge of and from all claims, to the time of executing these presents, in full satisfaction and payment of all such claims of all such creditors assenting, as aforesaid, and executing such release, as aforesaid, if the fund be sufficient for that purpose, and the balance or surplus, if any may remain, shall and will pay over to the said John Hollins, or to his legal representatives; but ratably and proportionably, accordingly to the amount of the claims of each of the said creditors, if the fund be insufficient to discharge the whole. *Provided* always, that the United States shall not be required to signify any assent, nor to execute such release, as aforesaid, to entitle them to a share of the proceeds or fund arising from this trust: and *provided*, also, that the proportion or share of such creditor or creditors, if any, as shall neglect, refuse, or omit to execute such assent or release, as aforesaid, shall not be distributed or divided amongst the other creditors, but shall be, by the said trustees, held subject to the future order and control of the said John Hollins, his executors, administrators, or assigns."

On the same day, the said John Hollins executed another deed, conveying other property, real and personal, to the *same* trustees, upon the *same* trusts, conditions, and provisos. Some of the creditors referred to assented to the deed, and executed the required releases, others did not.

Afterwards, in 1849, the trustees recovered, under the Commission between the United States and Mexico, a large sum of money, upon one of the claims assigned to them by these deeds, a large portion of which they divided, according to the terms of the trust, among the assenting creditors, but there still remained about $5,000 in their hands, undivided. John Hollins died in 1827, and his administrator, on the 8th of April, 1850, filed the present bill against the trustees, to recover the said balance of $5,000, according to the terms of the said deeds.

The trustees declined to pay over the money, except upon the order of the Court, and submitted whether this undivided residue should be paid to the complainant or to the creditors who had not assented to the deeds. The Chancellor, when the cause was first submitted to him, on the 12th of April, 1850, made the following remarks.]

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THE CHANCELLOR:

Assuming the validity of the deeds of trust exhibited with the bill, I am of opinion that the sum now remaining in the hands of the trustees, is, in the language of Exhibit A, "subject to the order and control of John Hollins, his executors, administrators, or assigns," and that upon the death of said Hollins, the complainant, his administrator, may rightfully demand it of the trustees, who would not be in any way responsible for its application by the administrator.

It may, however, be a question whether these deeds can be assumed to be valid. In the case of *Albert and Wife* vs. *Jones et al.*, decided at the last term of the Court of Appeals, a deed with such stipulations was adjudged to be invalid (7 *Gill*, 446), but in the subsequent case of *Kettlewell* vs. *Stewart*, the Court permitted the same question to be re-argued, and now hold it under advisement. It would, therefore, seem to be best to defer the decision of this case until the Court of Appeals shall have pronounced their opinion in the cause now before them, which will probably be in June next, and which, it is presumed, will finally settle this much vexed question.

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[The cause was again submitted and argued, on the 11th of March, 1851, when the Chancellor delivered the following opinion.]

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THE CHANCELLOR:

In the remarks made by me in this case, on the 12th April, 1850, it was suggested that the decision of the point involved in it be suspended until the case of *Kettlewell* vs. *Stewart*, then depending in the Court of Appeals, should be decided. That

case has since been decided, and although the validity of the deed drawn in question was affirmed by a divided Court (8 *Gill*, 472), I consider that I am obeying the weight of judicial authority in this State, in declaring the deeds in this case to be valid instruments. This being so, I see no reason to deviate from the conclusion to which I came when this case was before me twelve months ago. That conclusion was, assuming the deeds of trust to be good, "that the sum now remaining in the hands of the trustees should be subject to the order and control of John Hollins, his executors, administrators, and assigns," "and that, upon the death of Hollins, the complainant, his administrator, might rightfully demand it of the trustees, who would not be in any way responsible for its application by the administrator." The deed in this case, after providing for the payment of the expenses of the trust and a commission to the trustees, and for those of the creditors who should comply with the condition, by executing to the grantors "a full and final release and discharge of and from all claims to the date of the conveyance, in full satisfaction and payment of all such claims of all such creditors assenting as aforesaid, and executing such releases as aforesaid, if the fund be sufficient for that purpose, and the balance or surplus, if any may remain, *shall and will pay over to the said John Hollins, or to his legal representatives*, but ratably and proportionally, according to the amount of the claims of each of the said creditors, if the fund be insufficient to discharge the whole," contains this further provision, "that the proportion or share of such creditors, if any, as neglect, refuse, or omit to execute such assent or release as aforesaid, shall not be distributed or divided amongst the other creditors, but shall be by the said trustees held subject to the future order and control of the said John Hollins, his executors," &c.

It is clear, then, upon the terms of this deed, that the dividends, which would otherwise have been distributed to those creditors who failed or refused to sign the required release, were not to be paid to the creditors who did release, in the event of their not being paid in full, but those dividends were to be paid to John Hollins, one of the grantors. The assent-

ing creditors, therefore, were to be paid no more than the dividends of the trust fund, distributable to their respective claims, and in ascertaining the amount of such dividends, regard was to be had to the whole amount of claims specified in the schedules attached to the deed. If the trust fund should prove to be inadequate to the payment of all the creditors, the assenting creditors were to receive only dividends, and were not to have divided among them the shares of the creditors who refused to comply with the conditions of the deed, but those shares, by its explicit terms, were to be held "subject to the demand and control of John Hollins," &c.

The argument, therefore, that these dividends should be divided among the creditors who executed the releases, is in direct conflict with the provisions of the deed, to the terms and conditions of which they gave their positive assent, and the benefit of which, in consideration of that assent, they have enjoyed by receiving the dividends, which otherwise they could not have claimed.

The argument, also, that the creditors who have not assented are entitled to the benefit of this fund, cannot, I think, be maintained, because in that case they would, without complying with the terms of the deed, receive the same benefit under it as those who did assent to it, by releasing the grantors. It would in effect be destroying a most material stipulation of the deed, and defeat one of the principal inducements to its execution.

It is said, however, in the argument of the defendant's solicitor, that John Hollins has over this fund no more than a *power of appointment.* I do not concur in this argument. It is clear beyond controversy that this surplus, according to the provisions of the deed, was neither to be paid to the assenting or dissenting creditors, but, in the language employed in the instrument, was to be held by the trustees, "subject to the order and control of John Hollins, his executors, administrators, or assigns." The surplus, therefore, after paying the dividends of the releasing creditors, was to go back to John

Hollins. It was to be held by the trustees subject to his order and control, or the order and control of his executors or administrators.

I am therefore of opinion that the fund remaining in the hands of the trustees, after paying the expenses of the trust, the commissions to the trustees, the dividends of the creditors who have executed releases, and the United States, is payable to the complainant, as the administrator of John Hollins.

It appears by an agreement filed on the 8th of April, 1850, that the United States has been paid, and that the balance of the trust fund now in the hands of the trustees is the proportion thereof which would have belonged to the creditors named in the deed who did not execute the required release, if they had signed it. It is therefore supposed the Court might now pass a decree for the payment of the five thousand dollars claimed by the bill, but as I am not quite sure whether all the expenses of the trust have been provided for, and the five thousand dollars is the precise sum for which a decree shall pass, I will refrain from signing it now. The counsel may prepare a decree in which a provision must be inserted for the payment of the costs of this cause out of the fund. The trustees were, under the circumstances, perfectly justifiable in declining to part with the fund until protected by a decree.

Brown and Brune, for Complainants.
Charles F. Mayer, for Defendants.

JOHN GLENN, PERMANENT TRUSTEE OF ANN WATSON,
vs.
HUGH McNEAL AND JOSEPH D. WORLEY.

March Term, 1851.

[FRAUDULENT CONVEYANCES, VACATING OF.]

A DEED for the consideration of $404, expressed upon its face, was attacked by the creditors of the grantor as fraudulent as against them, and it was shown as a circumstance exciting suspicion of unfairness, that this consideration was totally inadequate to the value of the property, HELD—that it was not competent for the grantor to prop up the deed by proof of an indebtedness to the grantee for services rendered as a clerk: such superadded consideration, as far as it goes, destroys the character of the deed, and is inconsistent with the consideration expressed upon its face.

Such evidence, if admitted, would change the character of the deed from a bargain and sale to a covenant to stand seised to the use of the grantee; but proof of the same kind of consideration, varying only in amount, is admissible.

The grantee in a deed absolute upon its face, and professing to be for a moneyed consideration paid at the time, cannot, when such deed is impeached by the creditors of the grantor, show by parol that it was intended to be and was given as a mortgage to secure an old debt of more than twenty years' standing.

A deed to be good under the statute of Elizabeth, as against creditors, must be made *both* upon a valuable consideration and *bona fide;* if the intent be to defeat or defraud creditors, it is void, though the consideration may not only be valuable but adequate.

A conveyance to a creditor, executed two days before the grantor applied for the benefit of the insolvent laws, when she had stripped herself of all her property, and her creditors were numerous and pressing, is void under the insolvent system.

[The facts of this case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

This case has been submitted upon arguments, in writing, by the solicitors of the parties, and the pleadings and evidence have been read and carefully considered.

The object of the bill is to vacate three conveyances executed by Mrs. Ann Watson to the defendants. The two first are dated respectively on the 11th of July and 22d of August, 1843, to Hugh McNeal, the son of the grantor, and the last on the 20th of March, 1845, to Joseph D. Worley. These deeds are assailed as void, under our insolvent system, and as fraudulent and void at common law, and under the statute of Elizabeth.

With regard to those to the son of the grantor, I am satisfied that they cannot be supported against the claims of creditors. I am aware that the answers assert the *bona fides* of these deeds, but the proof, in my judgment, is quite sufficient to overthrow the answers.

The deed of the 11th of July conveys to the grantee, for the consideration of $404, as therein expressed, a term for years in a house and lot in the city of Baltimore. This property, on the 12th of the preceding month, had been conveyed to the grantor, by Mr. Griffith, for the same consideration; but the grantor, before her conveyance to her son, had put repairs upon it to the amount of $815 84, as proved by Mr. Earickson, the carpenter by whom this work was done.

Assuming, therefore, that the money consideration expressed in the deed was paid, it was totally inadequate to the value of the property, and would excite strong suspicions of unfairness. To obviate this, the defendant has examined the grantor herself, and she proves, that at the time of the sale to her son, the bill of repairs had not come in, and that she was to pay it, without charging it to her son, for his services, as a salesman in the store, for more than two years.

Now, viewing Mrs. Watson as a competent witness, and I am disposed so to regard her, the question arises whether this proof is admissible in support of the deed? I think it is not. It is clear, upon the authority of the case of *Cole* vs. *Albers & Runge*, 1 *Gill*, 412, and all the preceding cases on the subject, that if it had been proposed to prove that the entire consideration of the deed had been services rendered the grantor, and that no money had passed, it would have been inadmissible, because

such evidence, if admitted, would have changed the character of the deed from a bargain and sale to a covenant, to stand seised to the use of the grantee.

But if an entirely different consideration could not be proved, why should it be competent to the party to prop up the deed by proof of a superadded consideration, of a different description from that mentioned in it. As far as it goes, it destroys the character of the deed, and is inconsistent with the consideration expressed upon its face. The proof was received in the case of *Cole* vs. *Albers & Runge*, because it showed, not a different, but the same kind of consideration, varying only in amount. The consideration expressed in the deed in that case, and that offered to be shown by evidence *dehors*, was money. But in this case, when it is shown that the property conveyed, in its improved condition, was worth two-thirds more than the sum mentioned in the deed, as a circumstance of suspicion, an effort is made to sustain it, by proving an indebtedness on the part of the grantor to the grantee, and that this indebtedness formed a part of the consideration upon which it was executed. This, I think, cannot be done.

The plaintiff certainly has offered evidence strongly tending to show that the money consideration was not, and could not have been paid. It is difficult to suppose, in view of the condition and nature of the employment of the grantee, that he could have had by him this amount of money. Mr. Collins does prove that he saw the grantee pay some money, and "thinks it was something between four and five hundred dollars," but he is not positive. But suppose he was, and knew the precise amount paid, would that prove it to have been the money of the grantee? He was then living with his mother, as she says, in the capacity of clerk in her store, and there would have been no difficulty in performing the ceremony of paying and receiving money. Mrs. Watson had, just one month before, taken a deed from her vendor, Mr. Griffith, to herself. She had put extensive and costly improvements upon the property, the improvements amounting to more than double the sum she paid for it, and then, according to the defendant's ver-

sion of the transaction, she sold it to her son for what she gave for it, throwing the improvements in, to make up for what she owed him as a clerk, for services in her store for more than two years.

Some light may be reflected upon the character and motives which led to the deed of July, 1843, by looking into the circumstances attending the execution of that of August 22d following. Having by the first deed conveyed her store to her son, by the second she conveyed to him her entire stock of goods, and all her household and kitchen furniture. That she was then insolvent in fact, without credit, and pressed by those to whom she was indebted, is undeniably true; and she herself declares that she executed it "to keep the goods from being swept away." It further appears, from her own testimony, that she retained the possession of the goods and furniture, and disposed of them at her own pleasure. She says, in answer to the fifth interrogatory in chief, "that the goods and furniture never did go to the benefit of Hugh McNeal." "Some of the furniture is still in the possession of the witness, but is not worth fifty dollars." "Other creditors got the benefit of the goods." And in answer to the ninth cross-interrogatory, she says, "that witness sold him the house, and as to the other deed, witness felt that she was indebted to him, and witness thought him as well entitled to be paid as any one else, and he allowed her to dispose of the goods for the benefit of her creditors at large. She made the deed to keep the goods from being swept away, so that every creditor might get their just share." Now this, to say the least, is a very strange vindication of this last-mentioned deed. It was executed by Mrs. Watson because, as she says, she felt that she was indebted to her son, and she thought he was as well entitled to be paid as any one else; and yet he allowed her to dispose of the property for the benefit of her creditors at large. "She made it to keep the goods from being swept away, so that every creditor might get their share."

This appears to be a very extraordinary way of taking care of a favored creditor. The two motives assigned by the grantor for making the deed, are utterly irreconcileable. The first was

to secure a favored creditor, and the last to keep the property from being swept away, so that every creditor might get their just share. If the true object was to secure her son, how can it be true that it was the design of the grantor to save the property from those of her creditors who were then pressing, so that each and every creditor should receive his just share? And suspicion of the unfairness of this transaction is deepened by the fact deposed to by Mrs. Watson, that her son, for whose especial security the deed was executed, did not even participate with the other creditors in the advantage of that deed; for she says, in reply to the fifth interrogatory in chief, "that the goods and furniture did not go to the benefit of the said Hugh McNeal. Some of the furniture is there still, in the possession of the witness, but is not worth fifty dollars. Other creditors got the benefit of the goods."

This deed, however, of August, 1843, is obnoxious to other and fatal objections. It professes to have been executed for a moneyed consideration of $8,750, paid at the time by the grantee to the grantor, and is absolute in its terms. Now it is conceded that no such sum was paid, the proof of Mrs. Watson, in answer to the third interrogatory, being, that the consideration of the deed was $2,000, which she owed her son from his father's estate. And in reply to the fourth interrogatory, she says, "that witness was married to the father of said McNeal, and his said father died intestate, and left but one child, who is the said Hugh McNeal." "He died about twenty-nine years ago, and no administration was taken out on his estate. He left personal estate worth at least $2,000, which property witness used."

The deed, then, was not an absolute transfer of the title, as it purports to be, for the sum of $8,750, paid to the grantor in money, at or about the date of its execution, but was, according to the statement of the witness, a mortgage to secure an old debt of $2,000, without any solicitation or demand on the part of the grantee for security.

The counsel, in their arguments, differ in regard to the admissibility of the evidence. It being insisted on the part of

the complainant, that it is not competent to the other side, by parol, under the circumstances of this case, to convert the absolute conveyance into a mortgage, and such, I apprehend, is the true doctrine as applicable to this case.

In *Henderson* vs. *Mayhew, et al.*, 2 *Gill.*, 393, the rule is clearly stated by the Court of Appeals: "Parol evidence" (the Court say) "is inadmissible to change or contradict the terms of a written contract. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose, and so a grantor may, in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But parties to a written instrument are not permitted in controversies with strangers, to insist that it does not express what it was intended to express." Now that is precisely what is attempted here. It is the party to the instrument, the grantee, in a controversy with a stranger; that is, in a controversy with the trustee representing the creditors of the grantor, who attempt to show by parol that this absolute conveyance was intended to be, and was given as a mortgage, to secure an old debt of more than twenty years' standing.

My opinion is, that these two conveyances are void as against the creditors of the grantor, under the provisions of the statute of 13 *Elizabeth, ch.* 5. That they cannot be regarded as made upon a valuable consideration and *bona fide*, both of which must concur, for if the intent be to defraud or defeat creditors, the conveyance will fall, though the consideration may not only be valuable, but adequate; 1 *Story's Eq., sec.* 369. But upon a careful examination of the evidence, and for the reasons which have been in part stated, my opinion is, that the consideration was neither valuable nor *bona fide*, and therefore without inquiry how they may be affected by our insolvent system, they must be vacated, and a decree will be passed appointing a trustee to sell the property, for the purpose, of being administered by the complainant in insolvency.

I am not now prepared to say, however, that the defendant, Hugh McNeal, shall be held to account for the goods and furniture included in the bill of sale, but the decree may contain a direction that the Auditor shall ascertain the value of the

property from the pleadings and proofs now in the cause, and such other proofs as the parties may lay before him, and the question of the accountability of the said defendant to pay such value will be reserved for further order.

With regard to the deed to the defendant, Joseph D. Worley, of the 20th of March, 1845, I am satisfied that it is void under our insolvent system, as having been made "with a view, and under the expectation of taking the benefit of the insolvent laws." This deed, which was only executed *two* days before the grantor did actually apply for the benefit of the insolvent laws, conveyed to Worley all her remaining property, being her interest in her deceased husband's estate, and it is, as I think, impossible to suppose that she did not then contemplate making such application. She had stripped herself by these conveyances of every atom of property she had in the world. Her creditors were numerous and pressing, and, as is asked by the Court of Appeals, in the case of *Dulany* vs. *Hoffman*, 7 *G. & J.*, 177, "what reasonable expectation could she have had of being exempted from liability on account of her debts, and without such exemption, what other means of getting rid of her liabilities was left to her, than an application for the benefit of the insolvent laws?"

There are, moreover, circumstances connected with the alleged consideration for this deed to Worley, which could, perhaps, condemn it, even if not liable to the objection which has been stated. But I deem it sufficient to say, that it appears to me that it comes within the range of the insolvent system, and must be set aside as at variance with its policy.

The counsel for the complainant may prepare a decree vacating the three deeds, and appointing a trustee to make sale of the property contained in them, with a direction that for the proceeds of sale, the trustee in insolvency shall account in the Insolvent Court. The decree may also contain a provision referring the case to the Auditor, for the purpose of stating and reporting an account from the pleadings and proof now in the cause, and such other proof as the parties may lay before him, of the value of the personal property contained in the deed of the 22d of August, 1843, and such other accounts

as may be required, and reserving all questions relating to such accounts for further order.

WALLIS, for Complainant.
MAYER, for Defendants.

[The decree in this case was affirmed by the Court of Appeals. The Appellate Court concurred with the Chancellor in his views and conclusions respecting the second and third deeds, and declared the first fraudulent, upon the ground that the evidence showed that McNeal could not have paid the purchase-money expressed in the deed, and the additional sum for repairs, without deciding as to the competency of Mrs. Watson as a witness, or whether McNeal had a right to offer proof in support of the allegation in regard to his having paid for the repairs by means of his account for services as clerk.]

JOSHUA HUTCHINS, ET AL.,
vs.
MARY W. HUTCHINS, ET AL.
} MARCH TERM, 1851.

[CHARGE UPON REAL ESTATE DEVISED.]

A TESTATOR devised two tracts of land to his son in fee, upon condition that he shall keep and maintain his mother during life: "and it is moreover my desire that my said son do and shall provide for my daughters, Elizabeth and Susan, good and sufficient boarding, and comfortable clothing, so long as they may remain single." HELD—that this was a charge upon the *whole* real estate devised to the son, and that the daughters of the testator are entitled to a reasonable annual allowance for their board and clothing, or a gross amount in commutation thereof, out of the proceeds of the sale of the land.

This annual allowance is not to be made out of the profits of the estate, in common with the devisee and his family, nor are the daughters to be limited to a proportion of the interest on the proceeds of the sale.

[The facts of this case are stated in the Chancellor's opinion.]

THE CHANCELLOR:

This case having been submitted upon exceptions to the report of the Auditor, the proceedings have been read and considered.

It is assumed that the property sold by the trustee consisted of that portion of the real estate of Jarrett Hutchins, which he acquired under the will of his father, Thomas Hutchins, lying in Baltimore County, and that the land lying in Harford County remains unsold. The will describes the land in Baltimore County as containing one hundred and twenty-six and one-quarter acres, and the trustee sold one hundred and twenty-six and one-half acres. It is, therefore, assumed to be the same land, and, indeed, such I understood to be the statement of the solicitors of the parties, when they appeared before me.

The devise to Jarrett Hutchins is in the following terms: "I will and bequeath unto my son Jarrett, my farm, whereon I now reside, lying and being in My Lady's Manor, containing one hundred and twenty-six and one-quarter acres, more or less. Also, my farm in Harford County, to him and his heirs and assigns for ever, on condition that he, the said Jarrett Hutchins, shall keep or otherwise maintain his mother during life, or so long as she may remain single; and it is, moreover, my desire that the said Jarrett do and shall provide for my daughters, Elizabeth and Susan, good and sufficient boarding and comfortable clothing, so long as they may remain single."

It is not denied that this clause in the will operates as a charge upon the real estate devised to the son of the testator, and since the case of *Tolson* vs. *Tolson et al.*, 10 *G. & J.*, 159, it would be impossible to deny it. And as the decree in this case reserves to the said Elizabeth and Susan Hutchins the right to claim such proportion of the proceeds of the sale as they may be entitled to in lieu of such charge, the Court is now called upon to say what that proportion will be.

The evidence shows that the board and clothing of Elizabeth Hutchins is worth not less than $150 in Baltimore County *per annum*, and that she is about seventy years of age. Taking

this as the data, and making an allowance to her, according to the chancery rule, in lieu of the charge, and she would receive the sum of five hundred dollars, and this the Auditor has allowed her in account B, making a similar allowance to her sister Susan, though, as to the latter, there is no proof either touching her age or the condition of her health.

The counsel, I think, stated that nothing was claimed for Susan, though I am not positive as to this, nor do I remember why it was that the claim was not made.

The defendant, Mary O. Hutchins, for herself and her children, excepts to this account, *first*, that the said parties were only entitled to board and clothing out of the profits of the estate in common with the devisee, Jarrett, and his family, and, therefore, that they can only claim a reasonable proportion of the income of said estate or interest on the proceeds of sale; and, *secondly*, that the subsistence of said parties ought to be charged on the other real estate devised to Jarrett by his father, or, at any rate, that an allowance should be made in gross out of the proceeds of sale, and that the allowance so made by the Auditor in account B, is excessive, &c.

Upon examining the will, I am of opinion that the daughters of the testator, Elizabeth and Susan, are entitled to board and clothing, and that a reasonable annual sum must be allowed them for this purpose, or a gross amount in commutation thereof out of the proceeds of the sale. I do not think this annual allowance is to be made out of the profits of the estate in common with the devisee and his family, or that they (the daughters) are to be limited to a proportion of the interest on the proceeds of the sale. The direction in the will is that they shall have "good and sufficient boarding and comfortable clothing, so long as they may remain single."

It does not appear what family, if any, the devisee Jarrett had at the date of the will, in 1816, or when the testator died, on or about the same period. Nor does it appear what was the value of the other property devised to him. Moreover, this charge was only to continue so long as the daughters of the testator should remain single, and perhaps this may have

operated with the father in making the devise, and with the son in accepting it.

Nor do I think that the charge for boarding and clothing these parties should be thrown exclusively on the other real estate devised to Jarrett Hutchins. There is nothing to show its adequacy, and besides, the will fastens it upon the whole estate devised.

As, however, the land in Baltimore County was sold for the benefit of the heirs-at-law and creditors, and as the allowance made these parties in the account B, will make a deficiency to pay the claims of creditors, I do not think it would be proper to throw the whole burden upon the proceeds of this sale, and shall, therefore, affirming so much of the account as may now be done, refer the case to the Auditor to state an account, making the proper allowance in gross to the said parties, or one of them, and charging a proportion thereof on the proceeds of sale in this case, and the residue on the land in Harford County when the necessary proof is supplied.

ALEXANDER, for the Exceptants.
BOYD, for the other parties.

CATHARINE BOWIE
vs.
JOHN T. BERRY.

MARCH TERM, 1851.

[DOWER.]

A HUSBAND purchased land in 1832, during coverture, and took a bond of conveyance from the vendor, and the purchase-money having been paid, the legal title was conveyed to him in 1843. In 1839, he sold and executed a bond of conveyance conditioned to convey, free of incumbrance, on payment of the purchase-money. He died in 1848, never having executed a conveyance, the purchaser not having paid the purchase-money. HELD—That his widow was entitled to dower in this land.

Where a contract is made for the sale of an estate, equity considers the

vendor as trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor.

Where a husband holding an equitable title parts with it, or it is sold by his creditors during his lifetime, the wife is not entitled to dower, but there is no case which decides that a mere executory contract will have this effect.

It may be that an agreement to convey *before* dower attaches, will in equity defeat dower, but it has never been held that a mere *agreement* to convey after the inception of the title to dower, will do so.

The claim to dower is always a favored one; it is a legal right, and if the wife accept a devise from her husband in lieu of it, she is a purchaser of the thing devised for a fair consideration.

The estate of the wife does not take effect out of the ownership of the party assigning the dower, but it is regarded as a continuation of the estate of the husband, and there is no *mesne seisin* between the husband and the wife.

A part of the money received by the husband from his vendee was applied by him in payment for the land. HELD—that this sum must be deducted from the value of the land at the death of the husband, before dower is assigned; the vendee to that extent occupies by substitution the place of the vendor of the husband, but he cannot set off this sum against the dower.

The wife, in the assignment of dower as against the vendee of her husband, will be excluded from the value of improvements resulting from the actual labor and money of such vendee.

[The facts of this case are stated in the report of the former opinion of the Chancellor, in 1 *Maryland Chancery Decisions*, 452. After that decision had been made, a report was made and accounts stated by the Auditor, to which the defendant excepted, 1st, because the complainant was not entitled to dower at all; 2d, because no credit was allowed for the purchase-money paid by him, and applied by the husband in procuring the legal title, which he insists should be charged against the dower; and 3d, because in any event she is only entitled to dower in the lands after deducting such sum from their value. Upon the hearing of these exceptions, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

It is observed in the opinion delivered by this Court, on the 26th of July, 1849 (1 *Md. Ch. Decisions*, 452), that the case

had not been argued on the part of the defendant, and therefore the point was reserved whether the value of the property out of which dower was claimed, should not be diminished by the amount of certain sums paid by the defendant to Mr. Bowie in his lifetime, and which seems had been applied by him in procuring the title from his vendors.

The title, however, of the complainant to dower, was decided, and though without the benefit of an argument on the part of the defendant, was carefully considered. If, nevertheless, I could now be satisfied that the conclusion to which my reflections brought me at that time was erroneous, I should not hesitate to retrace my steps, and would do so the more promptly because the argument has been an *ex parte* one.

It will be observed that the answer of the defendant does not expressly, or indeed by any very strong implication, deny the complainant's right to dower. The ground taken in the answer is, if the complainant shall be determined to have a dower interest in the lands, he would be entitled as against her to have compensation and reimbursement for the sums which he had paid her husband, and which the latter had applied in procuring the legal title. The sums so paid by the defendant to Bowie, and by him applied in procuring the title, amount, as now appears, to $3,500.

The facts of the case are these: Mr. Bowie, the husband of the complainant, in September, 1832, and during the coverture, purchased the land out of which dower is claimed, taking from the vendor a bond, with condition to convey him the title on payment of the purchase-money, and on the 25th of November, 1843, the money being then paid, the legal title was conveyed to him.

In the year 1839, Bowie sold the land, or a portion of it, to the defendant for about thirty thousand dollars, and executed to him a bond of conveyance with condition, upon payment of the money, to convey him the title free from incumbrances. Bowie died in January, 1848, a portion of the purchase-money being then unpaid, and still remaining due from the defendant to parties to whom Mr. Bowie in his lifetime assigned the

defendant's bonds, and these parties are not now before the Court.

In the former opinion of this Court, it was said that "this is the case of a husband dying seized of a legal estate of inheritance," and therefore the widow's claim to dower could not be defeated; 1 *Md. Ch. Decisions*, 454. It is now contended, however, that inasmuch as the title of Mr. Bowie was only an equitable one in 1839, when he contracted to sell to the defendant, and as, according to the view which this Court has (1 *Md. Ch. Decisions*, 454) taken of the case of *Miller* vs. *Stump*, 3 *Gill*, 304, he might, by a transfer of his title in his lifetime, without his wife's consent, have defeated her claim to dower, his contract to sell must have the same effect, upon the principle of equity, that that shall be considered as done which the party has contracted to do; and consequently, when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor; *Sugden's Vendors*, 130.

There is no doubt that such is the rule in equity as between the parties to the contract, and yet it is perfectly well settled that a *bona fide* purchaser from the vendor without notice, would be protected from the claim of the vendee. Equity, therefore, does not, for all purposes and to every intent, consider that done which is only contracted to be done, because if that were so, a subsequent purchaser obtaining a conveyance without notice, could not hold against the title of the prior vendee claiming under a contract.

The cases in Maryland only prove, that where the husband holding the equitable title, actually parts with it, or it is sold and disposed of by his creditor during his lifetime, the wife shall not be endowed. There is no case which decides that a mere executory contract made by him will have the same effect.

Upon the purchase of this land by Mr. Bowie, in the year 1832, the right to dower attached, subject, to be sure, to be defeated by a transfer of his title in his lifetime. It may be

that in equity, an agreement of the husband to convey *before dower attaches*, will, if enforced in equity, extinguish the claim to dower; but no case, I apprehend, can be found, in which it has been held that a mere *agreement* to convey after the inception of the title to dower, has defeated the title, though an actual conveyance without the concurrence of the wife would have done so.

The claim to dower is always a favored one. It is a legal right, and if she accepts a devise from her husband in lieu of it, she is considered as a purchaser of the thing devised for a fair consideration; *Gibson* vs. *McCormick*, 10 *G. & J.*, 65, 113. But in this case Mr. Bowie not only died holding the equitable estate, bound, to be sure, by his contract with the defendant, but after he contracted with the defendant, he acquired the legal title, and was seized of that legal title at the time of his death. And at the time he thus acquired the legal title, the defendant had not put himself in a condition to demand a conveyance, by paying the purchase-money, a portion of which still remains due.

Mr. Bowie having, by the deed of 1843, acquired a legal estate of inheritance in possession, to which the issue of the wife might by possibility inherit, it follows, by the settled law upon the subject, that she could not be defeated of her dower by any act of the husband, without her concurrence; *Park on Dower*, 5.

The estate of the wife does not take effect out of the ownership of the party assigning the dower, but it is regarded as a continuation of the estate of the husband, for as soon as her dower is assigned the law supposes her in, by relation from the death of her husband, and does away all mesne seisin, or as Lord Coke expresses it, "the law adjudges no mesne seisin between the husband and the wife." *Coke, Littleton*, 241(*a*). The question is, whether, by the contract of 1839, made when Mr. Bowie only held an equitable title, the wife's right to dower, of which she could not be deprived by any act of his without her concurrence, after he acquired the legal title in 1843, shall be defeated?

In the cases which have been decided in this State, since the Act of 1818, ch. 193, which gives the wife dower in an equitable estate, the wife was denied her dower, because the husband's estate was divested during his lifetime. No case has been decided in which it has been held that a mere executory contract to convey by the husband has had the effect to defeat the dower, and certainly no case can be found in which the wife's right to dower in a legal estate of inheritance in the husband, either in deed or in law, has been defeated by the act of the husband without the concurrence of the wife, where the act was performed after the inception of the right of dower.

Here, the contract of 1839, which was made after the right to dower had attached, is relied upon. But that contract was never consummated; nor had the purchaser in the lifetime of the husband, nor has he now, put himself in a condition, by paying the money, to demand its fulfilment. And after the date of it, the husband took to himself the legal title, which deprived him of the power of defeating his wife's right to dower, without her consent. My opinion, therefore, is, that she is entitled to dower, or an equivalent in money.

It appears that $3,500 of the money, paid by Berry to Bowie, was applied by the latter, in payment of the land; and this sum, I think, should be deducted from the value of the land, as ascertained at the death of Mr. Bowie, before the dower, or its equivalent, is awarded the complainant. To that extent, I regard the defendant as occupying, by substitution, the place of those who sold it to Mr. Bowie; and as the dower-claim could not be enforced to their prejudice, so neither can it as against Berry, so far as he stands, by substitution, in their shoes.

I do not, however, think that Mr. Berry can set off this sum of $3,500 against the dower. That would be to defeat the claim altogether, and would place him in a better situation than the parties to whom Mr. Bowie paid the money. Mr. Bowie paid, out of his own means, the difference between the price he was to pay for the land, and the $3,500 paid by Berry, and which he applied to pay for the land. How much Mr.

Bowie did so pay out, of money not received from Berry, does not appear; but, if there be deducted from the value of the land, at the death of Bowie, the sum which he received from Berry and applied in payment of the land, it is all that can, in equity, be asked.

Proof has been taken of the age and health of Mrs. Bowie, and of the value of the land at the period of the death of Mr. Bowie, and of the value of certain improvements resulting from the actual labor and money of the owner; and the wife, according to the former opinion of this Court, is to be excluded in the assignment of dower, as against the defendant, from this improved value.

Accounts have been informally stated, and counsel have agreed that these may be considered as if they had been regularly reported by the Auditor. I cannot, however, pass a decree upon them as they stand; and shall, therefore, send the case to the Auditor, assuming, that an equivalent in money will be taken for the dower-interest.

PRATT and ALEXANDER, for Complainant.
ROBT. J. BRENT, for Defendant.

MADISON LEVERING AND OTHERS,
vs.
B. M. HEIGHE, ADM'R OF NATHAN LEVERING ET AL.
} DECEMBER TERM, 1850.

[MARRIAGE SETTLEMENT OF HER REAL ESTATE, BY A FEMALE INFANT.]

A FEMALE infant, in contemplation of marriage, and with the consent of her intended husband, executed a marriage settlement, conveying her entire real estate to a trustee, in trust for her separate use during coverture, with power to dispose of the same by deed or will, and in case of failure to make such disposal, in trust for any child or children she might thereafter have, and their heirs, &c.; but in case she died without leaving a child or children, or descendants of the same, living at the time of her

death, then one-half of said estate for the use of her husband and his heirs, and the other half to her own right heirs. She died during minority, leaving an infant child, who survived her but a few days. HELD—

That she had not the capacity so to bind her own real estate; but as the conveyance contains provisions beneficial to her, it is *voidable* only, and not absolutely *void*, and can be avoided by her privies in blood, but not by privies in estate only.

Contracts of an infant for necessaries, are binding, and such as are for his benefit, are voidable only; but a contract that the Court can see, and pronounce to be to the prejudice of the infant, is void.

There is no doubt of the power of a female infant to bar herself by her contract before marriage of her right of dower, in her husband's land, and of her distributive share of his personal estate.

It is clear, also, that such infant has the power to bind, by a settlement before marriage, her general personal estate, because such personal estate becomes, by the marriage, the property of the husband; and the settlement is, in effect, his settlement, and not hers.

The infant himself, when he attains age, or his representatives privies in blood, can avoid a voidable conveyance, made by the infant; but not privies in estate only.

In this case, the settlement being avoided, it was HELD—That the estate descended to, and the proceeds of the sale thereof should be distributed among, the uncles and aunts of the infant child, to the exclusion of the children of uncles and aunts.

[Nathan Levering, by his will, dated the 1st of February, 1827, directed, that his executors should hold his real and other estate, not therein otherwise disposed of, until his youngest child should attain the age of twenty-one years; and then directs the whole residue of his estate, real and personal, to be equally divided among his children, and be transferred and delivered to them, in possession, on the arrival of his youngest child at the age of twenty-one years. He left six children, surviving him; and the executor, declining the trust, B. M. Heighe, was, by a decree of Baltimore County Court, sitting in equity, dated the 25th of September, 1834, and passed, upon petition of the parties interested, appointed trustee, to execute the trusts of the will. On the 23d of October, 1838, after the youngest surviving child had attained the age of twenty-one, a petition was filed in the cause, by some of the parties interested, for a sale of the property, for the purpose of distribution. The other parties in interest, who were made

defendants, answered, and assented to the sale. George B. Stephenson, one of the said defendants, the surviving husband of Augusta Virginia Levering, the youngest child of the said Nathan Levering, filed the marriage settlement, executed at the time, and under the circumstances stated in the opinion of the Chancellor. A decree was thereupon, on the 25th of October, 1838, passed, for the sale of the property, and said Heighe appointed trustee for that purpose. The sale was accordingly made, and the Auditor, by his account, filed on the 29th of October, 1839, assigned one-sixth of the net proceeds of sale, to George B. Stephenson, as heir of his child by his wife, Augusta Virginia, said child having survived its mother and taken by purchase under said marriage settlement. To this account, the surviving brothers and sisters, and the children of the deceased brothers and sisters of the said Augusta, on the 15th of November, 1839, filed their exceptions, upon the ground that said settlement was wholly void as against them, and that the said Stephenson is only entitled to his curtesy interest in said property. Other accounts were then stated, in accordance with the views of the exceptants, and were confirmed, so far as they assigned the curtesy interest to said Stephenson; but the difference between this sum, and what he claimed under the settlement, was expressly reserved for future order. The other proceedings are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

This case, which has been argued upon exceptions to the report of the Auditor, presents a very interesting question, and one which, it is believed, is entirely new in our Courts.

The question is, whether a settlement of her real estate, made by a female infant in contemplation of, and before the eve of her marriage, is so far valid that in the event of her dying during her minority, the estate thereby conveyed shall descend in a manner different from the direction which the law of descents would give it in case of intestacy?

The facts are as follows. Augusta Virginia Levering, being

about to intermarry with George B. Stephenson, on the 11th of February, 1835, she being then a minor, about sixteen years of age, with the consent of her intended husband, who was a party to the deed, conveyed her entire estate, real and personal, to a trustee, to hold the same, and the profits thereof, in trust for her own separate use during the coverture, free from the control or claim of her husband, or his creditors, and with power to sell and dispose thereof without his concurrence, either by deed or will, and in case of her failure to make such disposition, then in trust for any child or children, she might thereafter have, their heirs, executors, administrators, or assigns. But in case she should die without leaving a child or children, or descendants of the same, living at the time of her death, then one-half of the estate is conveyed for the use of her said husband and his heirs, and the other half for the use and benefit of her own right heirs. The marriage took place, and Mrs. Stephenson, the grantor in the deed, died two years thereafter, leaving an infant, born of the marriage, who survived her mother only a few days.

The real estate has been sold, under a decree of Baltimore County Court, and the question is, whether the surviving husband is entitled only to a curtesy interest in the real estate included in the settlement, or to the whole thereof, as heir to his child, to the exclusion of the heirs of his wife? And this question depends upon the answer which is to be given to another, and that is, whether the child took by *descent* from the mother, or as a purchaser under the deed of settlement?

The general rule with reference to the contracts of infants, is stated by the Court of Appeals in the case of *Fridge* vs. *State, Use of Kirk*, 3 *G. & J.*, 115. Some of their contracts, say the Court, are binding, such as contracts for necessaries. Some are void, and others are voidable only, such as contracts that may be for the benefit of infants. But a contract that a Court can see and pronounce to be to the prejudice of the infant is void; and in that case the Court did pronounce a release, executed by a female ward to her guardian immediately upon her attaining the age of sixteen, upon receiving from him a note for the

balance due her, absolutely void. This question came up again, in the case of *Forbes* vs. *Forbes*, 5 *Gill*, 29, when the Court, without deciding whether a release executed by a minor under peculiar circumstances was void, or only voidable, adjudged that a second release, executed after he attained his majority, under the special circumstances of that case, and full proof of fairness and frankness, on an unreserved disclosure of facts, and careful examination of accounts, by the friends and advisers of the minor, was good, and that these circumstances would be regarded as the operating causes of the second release, at the time of its execution.

It cannot be denied that the question involved in this case has been the subject of much controversy in the English Chancery, and that conflicting opinions in regard to it have been entertained and expressed by the eminent men who have presided over that Court.

Mr. Atherly, in his treatise on *Marriage Settlements*, commencing at page 29, after a review of most of the cases, comes to the conclusion, that the authorities in favor of an infant's being able to bind her real estate by a settlement upon marriage, greatly preponderate over those the other way, though he very frankly admits that the point cannot be considered as settled.

On the other hand, *McPherson on Infants*, after an examination of the same cases, and perhaps of some others, arrives at a different result, and concludes that it is now established that the real estate of a female infant is not bound, so far as she is concerned, by a settlement on her marriage, because the general incapacity of infancy invalidates her contract, and the contract of the husband cannot extend beyond the limited interest which he acquires by the marriage.

There would seem to be no doubt of the power of a female infant to bar herself, by her contract before marriage, of her right of dower in her husband's lands, and of her distributive share of her personal estate. The decree of *Lord Nottingham* to the contrary, in *Drury* vs. *Drury*, in 2 *Eden's Rep.*, 39, was reversed in the House of Lords, and this reversal is con-

sidered by Mr. Chancellor Kent as finally settling this question. The case of *Drury* vs. *Drury* turned upon the statute of 27th *Hen.* 8, which introduced jointures, which *Lord Nottingham* supposed extended only to adult women, and this was the point of difference between him and the House of Lords.

This question came before the Chancery Court in New York, in the case of *McCartee* vs. *Teller*, 2 *Paige*, 511, and after a very learned and elaborate discussion at the bar, it was decided, that by analogy to the statute which made a legal jointure settled upon an infant before marriage a bar to her dower, a competent, and certain equitable provision settled upon her in bar of dower, and to take effect immediately upon the death of the husband, and to continue during the life of the widow, and being a reasonable and competent livelihood for the wife under the circumstances, was also a bar. There would seem to be as little doubt of the power of a female infant to bind, by settlement before marriage, her general personal estate, because such personal estate becomes, by the marriage, the property of the husband, and the settlement is in effect his settlement, and not hers. This general principle of the Courts of Equity, may, and probably would be considered as modified by the Act of our Legislature of 1842, ch. 293, with reference to the particular description of property mentioned in the Act.

But the question now to be decided is, whether a female infant has the capacity to bind *her own real estate* by a marriage settlement, and this question is considered by Chancellor Kent as being settled against the power, by the case of *Milner* vs. *Lord Harewood*, 18 *Ves.*, 259. It is true the precise point which the facts of that case made it necessary to decide, did not involve this question, but it is equally true that *Lord Eldon*, more than once in the course of his argument, expressed a decided opinion against the power; and I am persuaded no one can read what his *Lordship* said in that case, without being fully convinced of the absolute conviction of his mind, that a female infant would not be bound by such an *ante-nuptial* settlement of her own real estate.

A very strong case upon this subject is reported, in 13 *Eng.*

Cond. Ch. Rep., 78, the case of *Simson* vs. *Jones*, and according to the opinion of the Master of the Rolls (*Sir John Leach*), pronounced after full deliberation, the point would appear to be definitely settled against the power. The infant in that case was a ward of the Court, and the settlement, which was a most reasonable one, was held not to be binding upon the infant. It was not even contended there that the infant was competent so to bind her real estate or her personal estate, if the settlement had not been made with the approbation of the Court, and the question was, whether the Court had jurisdiction to give to a female infant the power of disposition of her separate property, during her infancy, by a settlement made in contemplation of marriage. In deciding against the jurisdiction of the Court to confer such power upon an infant, *Sir John Leach* said, "whatever doubts may have been entertained on the subject formerly, I take it to be clear that the real estate of a female infant would not be bound by a settlement made with the approbation of the Court, and it appears to me to follow, that the same principle is applicable to personal estate settled to her separate use." The parties who maintained the validity of the settlement in that case, presented a petition of appeal to the House of Lords, but it was subsequently abandoned, as the lady, it was fonnd, would be of age, and would have the power of confirming the settlement before the appeal could be disposed of.

It appears to me, therefore, that the weight of authority is against these settlements, and I can see no sufficient reason why the rule of law which incapacitates infants from disposing of property should be relaxed in their favor. The contract of a female infant in reference to her dower and thirds, when made upon a sufficient consideration stands, as we have seen, upon a totally different ground, as do those settlements before marriage, which relate to her general personal estate, which upon the marriage would by operation of law devolve upon the husband.

But though I think the settlement in this case was not absolutely binding upon the wife, so far as the real estate is con-

cerned, I do not look upon it as simply void, because its stipulations and provisions appear to me to have been beneficial to her.

Indeed, none of the cases to which I have been referred, or which I have met with in the books, treat these settlements as merely void, and incapable of confirmation by the wife after she attains the competent age. The cases, on the contrary, show that the infant may give efficacy to the settlement, either by an express confirmation after attaining majority, or by some act which would make it inequitable in her to impeach it.

In *Durnford* vs. *Lane*, 1 *Brown's Ch. Cases*, 106, Lord Thurlow, after expressing a strong opinion against the validity of settlements by female infants in contemplation of marriage, even when made in consideration of a competent settlement upon her, says, "if she has a settlement from her husband, and after his death she takes possession of it, he thought she would be bound by the equity arising from her own act, and this observation he made, as he remarked, in deference to the cases of *Cannel* vs. *Buckle*, 2 *Peere Wms.*, 243; and *Harvy* vs. *Ashley*, 3 *Atk.*, 615." In this latter case, the opinion of Lord Hardwicke is clearly expressed in favor of the validity of the agreement of an infant, when confirmed by his acts after the disability is removed. And in the case of *Milner* vs. *Lord Harewood*, 18 *Ves.*, 259, the sanction of Lord Eldon is given in the most unqualified terms to the doctrine upon this subject, as stated in *Durnford* vs. *Lane*, it being in the former case held, that a female infant was not bound by an agreement to settle her real estate upon marriage, if she did not when of age choose to ratify it, and that nothing but her own act, after the period of majority, could make it binding upon her. The opinion of the Master of Rolls, in the case of *Simson* vs. *Jones*, 13 *Cond. Eng. Ch. Rep.*, 78, is in accordance with the previous cases, in reference to the capacity of the infant to confirm the settlement after attaining the required age. In pronouncing against the settlement in that case, he said a good title could not be made under it, "unless by the confirmation of the wife after the age of twenty-one."

I take it, therefore, to be quite clear, that though a female infant has not the capacity to bind *her own real estate* by a marriage settlement, that nevertheless she may or may not give it validity by her acts, or by express confirmation, when the disability ceases to exist, and that, therefore, such settlements cannot be regarded as purely and absolutely void.

Supposing this to be the true doctrine, and it would seem to follow necessarily that the settlement of the 11th of February, 1835, so far as the real estate of Mrs. Stephenson is concerned, cannot be allowed to stand, it having been executed by her during her minority, and she having died before attaining her full age, or having done or having been capable of doing any act to give it validity. But conceding the settlement to be voidable merely, and to require some act of dissent or disaffirmance to destroy its efficacy, it is material to inquire whether these exceptants are in a condition to entitle them to avoid it, they being the brothers and sisters, and children of brothers and sisters of the whole blood of Mrs. Stephenson.

It is very certain that Mrs. Stephenson, who died under coverture, and a minor, was not herself in a situation requiring or enabling her to avoid the settlement, and her infant child, who died but a few weeks after its birth, was equally incapable of doing so, and if these parties are not permitted to avoid it, then it follows that the settlement must stand, and all the consequences resulting from regarding it as a valid instrument must ensue.

These parties, by their exceptions filed on the 15th of November, 1839, contest the validity of the settlement, and by their petitions filed on the 30th of September, 1846, the fund being then and still under the control of the Court, expressly disaffirm the deed, and claim the fund in opposition to it. And it is and must be conceded, that George B. Stephenson, the surviving husband of Augusta, and father of her infant child, can have no claim to the money now in controversy, unless the deed in question is to be regarded as a valid and operative instrument. If it be not, then, as the estate descended to the infant child on the part of the mother, it must, upon her death,

go to the relatives on the part of the mother (who are the exceptants), to the exclusion of the father, according to the provisions of the first section of the Act of 1820, ch. 191. It can only be, by considering the deed valid, and that the child takes as a purchaser under it, that the father can claim, the child upon that hypothesis constituting a new root or stock of inheritance, and the father, under the circumstances of the case, by the terms of the same Act, taking as heir to his child.

These exceptants are privies in blood to the mother and the child, and standing in that relation, they seem to have the clear right to set aside the deed in question, the rule being, that the infant himself, or his representatives, privies in blood, can avoid a voidable conveyance made by the infant. *Whittingham's Case*, 8 *Rep.*, 42. If the infant does not live to confirm or adopt at full age the feoffment which he made during his minority, it may be set aside by persons who are privy to him in blood, but not by a person who is privy in estate only. *McPherson on Infants*, 465.

My opinion, therefore, is that, viewing this settlement as one of those voidable acts which must be disaffirmed in order to set it aside, that these exceptants, who are privy in blood, are competent to do so, and that, having availed themselves of that privilege, the deed is to be disregarded, and the estate then descending to the heirs on the part of the mother, the father can take no more than his curtesy interest, and that it appears from the proceedings he has already received.

And I am further of opinion, that upon the true construction of the Act of Assembly, and upon the authority of the case of *Porter* vs. *Askew*, 11 *G. & J.*, 346, the residue of the proceeds of these sales resulting from that portion of the real estate sold which belonged to Mrs. Stephenson, must be distributed among the uncles and aunts of her infant child, to the exclusion of the children of uncles and aunts, if any there be. The case will be sent to the Auditor, to state an account accordingly.

LATROBE, for the Husband.
MCMAHON, for Exceptants.

JOHN H. B. LATROBE, TRUSTEE,
vs.
THOMAS T. HERBERT ET AL.

March Term, 1851.

[EXCEPTIONS TO TRUSTEE'S SALES.]

When a trustee deviates from the terms of the decree, objections to the ratification of the sale will be allowed to prevail, which would be disregarded if urged against a sale in conformity with the decree; and no deviation is more obnoxious to objection than selling at private sale when the decree directs a public sale.

The trustee is the mere agent of the Court, and if he does not conform to the authority delegated to him, it is for the Court to say whether it will ratify his acts as such agent.

His instructions are contained in the decree, open to the inspection of all parties, and if he does not follow them, no one dealing with him has a right to complain if the Court should refuse to ratify his acts.

After he has put the property in market agreeably to the terms of the decree, and has failed to get an acceptable bid, he may sell at private sale, and if no objection be made, the Court will, after notice in the usual way, ratify the sale.

Objections merely capricious or arbitrary to such a private sale will not be allowed, but it is open to objections which would not prevail against a public sale.

The decree directed a public sale, and after one ineffectual effort to sell at such sale, the trustee sold the property at private sale at $17 per acre. It was proved that this sale was the result of a misunderstanding between the trustee and the mortgagor, whom the former had consulted and advised with in relation to the sale, and that $20 per acre could then and now be had for the property. Held—

That the sale ought not to be ratified.

Inadequacy of price is a stronger objection to a private sale than to a public one, when the decree directs the latter; and though the inadequacy in this case might not be sufficient, *per se*, to set the sale aside, yet this, added to the misunderstanding between the trustee and the mortgagor, is sufficient to defeat it.

[The facts of this case are stated in the Chancellor's opinion.]

The Chancellor:

This case is brought before the Court upon exceptions to

the sale reported by the trustee, and I have read and reflected carefully upon the facts and circumstances connected with it, after listening attentively to the arguments of counsel.

The decree, which is in common form, directs the property to be sold publicly, after giving three weeks' notice by advertisement in newspapers, of the time, place, manner, and terms of sale, and the trustee's report shows that one effort was made to sell in the manner and according to the terms of the decree. This attempt, which was made on the 11th of February last, was ineffectual, no one present offering to give $17 per acre for the property, that being the price which the trustee and Thomas T. Herbert, the tenant for life of the mortgaged premises, would at that time have been willing to take for it. After this, to wit, on the 18th of March following, a private sale was made to Mr. Richard Davis, at $17 per acre, and this sale being objected to by Mr. Herbert, in his own behalf, and as the next friend of his infant children, tenants in remainder in fee of the mortgaged premises, the question is, shall it be ratified by this Court?

It appears by the exceptions, and by the answer of Mr. Latrobe, the trustee, to the exceptions, that in all matters relating to the sale, the latter advised with and consulted Dr. Herbert, and it is also alleged in the exceptions, that after the unsuccessful effort to sell at public sale on the 11th of February, it was understood by the exceptant that no disposition should be made of the property by the trustee, without previous notice to the former, the exceptant then expecting to dispose of the property at $25 per acre, and that about the 1st of March he received from a responsible party an offer of $20 per acre, which the same party is now willing to give. That the exceptant did not communicate this offer to the trustee, because he supposed that, according to the understanding between them, the trustee would make no disposition of the land without previous notice to him.

The exceptions, which are verified by the affidavit of the exceptant, contain other matters which I do not consider it necessary to notice. The only matter of fact contained in

the exceptions, which is not admitted in the answer of the trustee, relates to the statement in regard to the understanding between him and Dr. Herbert, prior to the sale to Mr. Davis. The trustee says, "that when he parted from said Herbert at the last interview which he had with him prior to the sale to the said Davis, he did not understand that no sale was to be made by him, without further conference or communication with said Herbert." "Something was said about a future sale at such interview, but the trustee understood it to refer to a public sale, the time for which was to be a matter of consultation with said Herbert," and the trustee regrets the misunderstanding between himself and said Herbert.

Evidence has been taken under an order, and it very clearly appears that at least $20 per acre could have been obtained for the property, and there is the strongest ground for believing that that price could now be had.

When the trustee deviates from the terms of sale prescribed by the decree, there can be no sort of doubt that objections to its ratification will be allowed to prevail, which, if urged against a sale made in conformity with the terms, would be disregarded, and perhaps no deviation could render a sale more obnoxious to objection than selling at private when the decree directs a public sale.

When a sale is made in all respects according to the terms of the decree, and neither fraud, mistake, or misrepresentation can be alleged against it, the faith of the Court is pledged to ratify and perfect it, but when the terms are departed from, there cannot possibly be any sort of obligation on the part of the Court to sanction it. The trustee is the mere agent of the Court, and if he does not conform to the authority delegated to him, it is for his principal to say, when he makes report of his proceedings relative to his agency, whether it will ratify his act as such. His instructions are contained in the decree, open to the inspection of all parties interested, and if he does not follow them, certainly no one dealing with him has a right to complain if the Court should withhold its sanction when called upon to confirm his act. It is perfectly true, as has

been said, that after the trustee has put the property in the market, agreeably to the terms of the decree, and has failed to get an acceptable bid, he may dispose of it at private sale, or upon terms in other respects varying from the decree, and if no objection be made to it, after public notice given in the usual way, it will be confirmed. And it is supposed that objections of a merely capricious or arbitrary character would not be allowed to prevail. But it would seem upon principle, and it is believed to be the law of this Court, that a private sale, even after an ineffectual effort to sell publicly, is open to objection, which would not be allowed to stand in the way of a public sale. 1 *Bland*, 144; *Md. Ch. Pr.*, 146. The principle that this Court will ratify an act when done, which upon application it would have ordered to be done, has been invoked in aid of this sale, and the case of *Tyson* vs. *Mickle*, 2 *Gill*, 376, is cited, as sustaining the applicability of the principle to cases like the present.

The principle may be, and probably is, to a certain extent, applicable, but it will be found, upon an examination of the case relied upon, that the circumstances of that and the case now under consideration are widely different. In that case repeated attempts had been made to sell the property at public sale, according to the decree, and persevering, earnest, and long-continued efforts had been made by the trustees to sell at the minimum price agreed upon by the parties, which was at last accomplished, after an interval of two years and six months from the first attempt to sell at public sale. It was in reference to these circumstances that the Court of Appeals say, that if the trustees, instead of closing the bargain when they received the offer, had reported the facts to the Chancellor, and asked his permission to sell the property on the terms proposed at private sale, there can be no doubt he would have granted it; and if so, the Court will, in the absence of proof showing the inexpediency or injustice of so doing, "ratify the act done, in the same manner as if the requisite authority had been previously granted." It will be observed that even with reference to the peculiar and strong circumstances of that case, the ratification

of a private sale is far from being stated to follow as a matter of course. It will be ratified, say the Court, "in the absence of proof showing the inexpediency and injustice of so doing." So that, even when the Court has given specifically its authority to make a sale upon terms and conditions previously communicated to it, there rests upon it no absolute obligation to confirm the sale when made.

But the case now before this Court is totally unlike that of *Tyson* vs. *Mickle*. Here there was but a single effort to sell according to the decree, and in a little more than one month afterwards the private sale was made. It may be that the Court, if it had been previously applied to, would have authorized the trustee to close with the offer; but it does not follow as a matter of course that it would have done so, as was observed in *Tyson* vs. *Mickle*. There was nothing so discouraging in one fruitless effort to get an acceptable bid, as to induce the Court to catch eagerly at the first offer of the minimum price; and there can be no doubt that if an application had been made, and the exceptant had been notified of it, no such authority would have been given, because the Court would have been informed by him that a better price could be had, as clearly appears to be the case. That there was a misapprehension between Dr. Herbert and the trustee there appears to be no reason to doubt, and there is as little doubt that the sale in question was the result of that misapprehension.

Arguments have been addressed to the Court to show, on the one side, that Herbert has been guilty of negligence, in not communicating with the trustee, and on the other, that the purchaser was guilty of duplicity and bad faith, in closing the contract before the trustee could confer with Herbert. I do not propose to express any opinion with regard to these criticisms of the counsel, or to say whether, in my judgment, negligence or blame is to be imputed to these parties. Because, though Dr. Herbert may not have been vigilant in looking after his interest, there is no reason on that account for inflicting injury upon his infant children; and because there appears to me to be enough in the circumstances of this case to induce

the Court to withhold its ratification from this sale without imputing bad faith to the purchaser, which I do not mean to impute. I do not set aside this sale because of the inadequacy of price *per se*, though I do not altogether agree with the counsel for the purchaser that inadequacy of price is no stronger objection to a private than to a public sale, when the decree directs a public sale. Inasmuch as the price of $17 per acre would have been satisfactory at the public bidding, I should probably have been unwilling to disturb the private sale for that sum, simply because a few dollars more per acre could have been obtained for the property. The fact, however, that more can be had for the property, is certainly a consideration, and when to this is added the circumstance that there was a misapprehension between Herbert and the trustee, it seems to me, at least in the case of a private sale, sufficient to defeat it. It has been argued that the purchaser had nothing to do with this misapprehension, and should not be affected by it. It is true he had not, but the agent of this Court had; and if in consequence of such misapprehension injury is done to the parties interested in the act of the Court, through its agent, it is its duty to apply the proper remedy.

It has been likewise insisted that as the decree passed in this case was to pay a creditor, Herbert, the mortgagor, had no right to interfere with the sale one way or the other. The answer to this is to be found in the statement in the exception, which is admitted to be true by the answer of the trustee, Mr. Latrobe, that in all matters relating to the sale, the latter advised with and consulted Herbert. It is very certain that Herbert had no right to forbid the sale, but as the trustee, in the exercise of his discretion, had thought fit to counsel and advise with him, he cannot be regarded as intruding himself in a matter in which he had no concern, even if his relation to the case, as mortgagor, would not exempt him from any such imputation.

The principles settled by the Court of Appeals, in the case of *Johnson* vs. *Dorsey*, 7 *Gill*, 269, are inapplicable to this. That was a public sale, in precise conformity with the terms of the decree, and I am not at all to be understood as saying that if

this had been a public sale there is anything in the objections urged against it which would induce the Court to set it aside. But when a sale is reported which was not authorized by the terms of the decree, the Court will listen to objections against it to which it would have turned its ear if the decree had been followed.

This sale then will not be ratified, because it was a private sale resulting from misapprehension between the trustee and the party with whom he advised and consulted, and because I am satisfied a better price could then, and can now be had for the property.

—

DOBBIN and TALBOTT, for Exceptant.
E. HAMMOND, for the Purchaser.

THE UNITED STATES INSURANCE COMPANY,
vs.
SHRIVER, FREEMAN, AND OTHERS.
} MARCH TERM, 1851.

—

[REGISTRY ACTS—MARSHALLING OF SECURITIES—NOTICE TO A DIRECTOR OF A CORPORATION.]

—

CONVEYANCES of equitable interests in lands, are within the Registry Acts; and the conveyance of such interest first recorded, must be preferred, unless the grantee had actual notice of the prior unregistered deed.

The design of the Registry Acts was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records.

The Act of 1831, ch. 205, sec. 3, authorizing bonds of conveyances to be recorded, does not, nor was it intended to, touch *conveyances* of the title, either legal or equitable; its object and effect is simply to authorize the registration of contracts to convey, and not conveyances.

If the subsequent mortgagee, whose deed is registered, had notice at the time of making his contract, of the prior unregistered deed, he shall not avail himself of the priority of his registry, to defeat it.

But such notice must have been received, or chargeable, when the second mortgage was executed; for if a right had vested, when the notice was received, he has then a right to try his speed in attaining a priority of registry.

The registered conveyance will not be postponed, unless the notice is so

clearly proved, as to make it *fraudulent* in the purchaser, to take and register a conveyance in prejudice to the known title of the party holding the first conveyance.

Notice given to a director of an incorporated institution, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the institution.

But if the notice is given to him officially, for the purpose of being communicated to the board, although such notice should not be so communicated, the institution is bound by it.

If one party has a lien on, or interest in, two funds for a debt, and another party has a lien on, or interest in only one of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties.

[The facts of this case, are stated in the Chancellor's opinion.]

THE CHANCELLOR:

Although, for the reason stated to the counsel during the argument, I cannot now pass a final decree in this cause, I shall proceed, very briefly, to express my opinion upon some of the questions which have been discussed.

These questions are important, and, perhaps, not free from difficulty; and the conclusions to which, upon a careful consideration of them, I have arrived, have not been formed without considerable doubt and distrust.

The proceedings show, that in March, 1827, Christian Keener, David Keener, and Samuel Keener, purchased of Andrew Shriver, and others, a house and lot, on Market Street, in the City of Baltimore, for the sum of $10,000, for which they took a bond, conditioned for the conveyance thereof on payment of the purchase-money; that they did pay a part, and were put in possession, and subsequently sold the same to William H. Freeman, who took possession, and paid his vendors, the Keeners, on account thereof, the sum of $7,000, being the amount which they, the Keeners, had paid the Shrivers; the balance of the purchase-money, due the latter from the Keeners, being, by agreement, to be paid by Freeman.

In this state of things, Freeman, being indebted to the Gene-

ral Insurance Company in the sum of $15,000, executed to that Company a mortgage of this property, on the 16th of January, 1834, which was duly acknowledged and recorded among the land records of Baltimore County, on the 2d of April following; and on the 29th of March, of the same year, he executed to the United States Insurance Company, to secure the payment of the sum of $80,000, a mortgage of this, with sundry other parcels of property, which last-mentioned mortgage was, also, duly acknowledged and recorded, on the day of its date; and the question is, which of these two mortgages is entitled to priority?

It is maintained, *first*, on the part of the General Insurance Company, that inasmuch as Freeman, the mortgagor, had but an equitable interest in the premises, there was no necessity at all for the registration of the deed, and that, consequently, the United States Insurance Company are not entitled to be preferred, because their deed was placed first upon the records. In other words, the position is, that conveyances of equitable interests in lands, are not within the Registry Acts. If they are, then, according to the express terms of the first section of the Act of 1825, ch. 203, the deed first recorded must be preferred; unless, indeed, it can be shown, that when that deed was taken, the grantee had actual notice of the unregistered conveyance.

This question, with reference to the necessity of recording conveyances from parties holding equitable estates, arose in the case of the *Ohio Life Insurance and Trust Company* vs. *Winn and Ross*, 2 *Md. Ch. Decisions*, 25; and although it does not distinctly appear that it was made a point in the argument at the bar, it was expressly decided by the Court, and upon subsequent reflection, I am persuaded was correctly decided. It appears to me to be quite clear, that conveyances of such titles to real estate are within the wise and salutary policy of our Registration Acts; and that one of the great ends of those Acts, as declared in the preamble to that of 1766, ch. 14, would be defeated, and creditors and purchasers exposed to many of the hazards, which it was the design of the legisla-

ture to protect them from, if they are to receive the narrow construction contended for. There is nothing, as I conceive, in the language of the Acts, which restricts them to conveyances of the legal estate; and, in the words of the eminent Judge who delivered the opinion of the Court of Appeals, in *Hays* vs. *Richardson*, 1 *Gill & Johns.*, 384, "their design was that all rights, incumbrances, or conveyances touching, connected with, or in anywise concerning land, should appear upon the public records."

It would, indeed, be strange, and as much to be regretted as strange, that an absolute deed from a party holding under a bond of conveyance, and who had paid the whole purchase-money, need not go upon the record for the information of creditors and purchasers, and yet a deed for any estate above seven years must be registered to be effectual. In the one case the whole beneficial interest would pass without registration, and consequently without notice to the public, whilst in the other, because the grantor happened to be clothed with the legal estate, if he attempts to convey an interest for any time more than seven years, his purpose will be frustrated, unless the deed is acknowledged and recorded as required by the statute.

I do not think that the argument which has been made, to prove that deeds or mortgages made by parties holding under bonds of conveyance are not within our Registry Acts, derives any strength from the Act of 1831, ch. 205, the 3d section of which authorizes bonds of conveyance or contracts to be recorded, and makes copies from the record evidence. That Act does not touch, nor was it intended to touch, *conveyances* of the title, either legal or equitable, and its object and effect is to authorize the registration of contracts to convey, and not conveyances, and therefore the right or the authority to record the latter, whether of the legal or equitable title, must depend upon the state of the law as it stood before. It is, therefore, as it seems to me, no argument against the right to enrol a conveyance of an equitable title, to say that there was no law which authorized the enrolment of the bond of conveyance

from Shriver to the Keeners, of 1827. So far as relates to the parties to the conveyance, the contract is complete; not so with reference to the bond or contract to convey, which gives no more than a right to compel a conveyance upon performance by the obligee, or the party contracted with, of his part of the contract.

I conclude, therefore, without further reasoning upon the subject, that the Registry Acts do embrace the mortgages of the 16th of January and 29th of March, 1834, and that the preference is to be given to that which was first recorded, unless the mortgagee, at the time it was taken, had notice of the prior deed. It is a settled rule, says Chancellor Kent, in the 4th volume of his Commentaries, 169, "that if a subsequent purchaser or mortgagee, whose deed is registered, had notice at the time of making his contract of the prior unregistered deed, he shall not avail himself of the priority of his registry to defeat it, and the prior unregistered deed is the same to him as if it had been registered." The notice, however, must have been received or chargeable when the second mortgage was executed, for if a right had vested when the notice of the prior unregistered incumbrance was received, "the mortgagee has then a right to try his speed in attaining a priority of registry." *Ibid.*, 172.

The question then is, whether the United States Insurance Company, when they took the mortgage of the 27th of March, 1834, had notice in fact of the existence of the prior incumbrance of the preceding January to the General Insurance Company, for if they had, then, as to them, it is the same as if it had been registered.

This doctrine of postponing registered to unregistered conveyances, upon the ground of notice, has sometimes been regretted by the Courts, and it is subject to the qualification that it shall prevail only in cases where the notice is so clearly proved, as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of the other party holding the first conveyance; *Wyatt* vs. *Barwell*, 19 *Ves.*, 439. It is, says Sir William Grant, in that case,

"only by actual notice, clearly proved, that a registered conveyance can be postponed."

I have read the evidence in this case with great attention, and do not think it furnishes that clear and convincing proof which the rule requires. Suspicion of notice is not sufficient. The inference of a fraudulent intent affecting the conscience, must be founded on strong and pregnant circumstances, in the absence of actual notice; 4 *Kent*, 172. There is, unquestionably, some confusion in the evidence of Mr. Freeman upon this question of notice; and when it is remembered that in the list of his property, which has. been produced and proved to be in his own handwriting, this Market Street property is put down at $16,000, the inference is very strong, that no notice was taken of the lien of the General Insurance Company, because, as he himself says, in his answer to the 11th cross-interrogatory, the lien of that Company covered the entire interest of the witness in the property. It is said there was another list, and I take it for granted there was; but Mr. Freeman says, in answer to the 12th cross-interrogatory, that he does not know whether said lien was on the list or not, "nor has he any belief on the subject, except as a matter of inference." That Mr. Freeman furnished the list in which this piece of property is estimated at $16,000, which was the full value of his interest in it, throwing out of view altogether the lien of the General Insurance Company, as the basis of his application to the United States Insurance Company for a loan, there is, I think, no reasonable ground to doubt. Mr. Atkinson, the Secretary of the United States Insurance Company, says that he found the list among the papers of the Company, and that it corresponds with the entry in the day-book; and that upon a careful search among their papers, he has not been able to find any other list. Now, if Mr. Freeman did not intend that this piece of property should be taken as a valuable security, why did he put it in the list at all? According to his answer to the 11th cross-interrogatory, the lien of the General Insurance Company was equal to the full amount of his interest in the property. Why, then, did he

include it in the list? If the United States Insurance Company knew of the prior mortgage, they also knew that this property thus encumbered was no security whatever. If they did not know of its existence, they were deceived with regard to it.

In the absence, then, of any other list, and without any proof that the lien in question was noted upon such other list (for Mr. Freeman expressly says he does not know whether said lien was on it or not), and seeing that the list which has been produced was preserved by the United States Insurance Company, and furnished the basis of an entry in its books, there would seem to be very little doubt that it was regarded by the Company as a substantial and not a mere nominal security, which it would have been considered, if known to be encumbered by a previous mortgage to the full value of the interest of the mortgagor in it.

The ground taken in this case is, that Peter Neff, the President of the United States Insurance Company knew of the lien held by the General Insurance Company, and this knowledge, it is insisted, is binding on the corporation of which he was the President. But there is no proof bringing home to Mr. Neff specific knowledge of this lien. It rests entirely upon inferences drawn by Mr. Freeman from the fact, as appears by his answer to the 4th interrogatory in chief, that Neff had full knowledge of all his real property, and transactions concerning the same. He says expressly that he cannot say whether Neff had *specific knowledge* of the lien of the General Insurance Company, and by his answer to the 8th cross-interrogatory, it appears that the witness, Freeman, was largely engaged in business transactions, buying and selling, and that his property and his interest therein was continually and almost daily changing. Now, under these circumstances, and in view of the rapid and constant mutations which property in the hands of this gentlemen was liable to, when its condition one day furnished no ground for assuming what its situation might be the day after, it would seem improper, merely because an individual happened to be familiar with his

affairs, to charge that individual with knowing, at a particular point of time, the precise condition of a specific portion of his property, especially when the imputation of such knowledge involves the guilt and consequences of fraud.

But assuming, for the sake of the argument, that Mr. Neff did know of this lien, the question still remains, whether his knowledge is the knowledge of the corporation, and binding upon it?

There is not a particle of testimony that the mortgagor, Freeman, communicated the information to Neff in his official capacity and for the purpose of being disclosed to the directors of the Company of which he was the president. If Neff had knowledge of the lien at all, it was acquired in a general way, in conversations with Freeman about his affairs, and certainly with no direct view to this particular transaction, or for the purpose of being communicated to the Company over which he presided. This is most manifest from the whole scope and tenor of the evidence, and hence the legal question arises, whether knowledge picked up in this way by a director of a corporation in his private and not in his official capacity, with no view to the transaction in question, shall so far affect the corporation with notice as to invalidate that transaction upon the ground of fraud?

It appears to me that the sound and safe rule on the subject is this, that notice given to a director of an incorporated institution privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the Board, will not bind the institution. But that if the notice is given to him officially, for the purpose of being communicated to the Board, although such notice should not be so communicated, the institution is bound by it.

This appears to me to be the reasonable doctrine, and to be maintained by the weight of authority, though, as remarked by *Mr. Justice Story*, in his treatise *on Agency*, it is not very easy to affirm what is the prevailing rule, since the authorities are not entirely agreed. *Story on Agency*, *sec.* 140 (*a*). The

cases which make a distinction between notice to a director who acts at the Board in the particular transaction, and notice to a director who does not so act, and which affirm that the corporation is bound in the former case and not in the latter, are evidently disapproved of by the learned author, who is of opinion that if either of these distinctions is to prevail, the foundation on which the security of all moneyed or other corporations rests will be sapped, it being clearly his opinion, that no act, or representation, or knowledge of any agent of such corporation, should bind it, unless officially done, made, or acquired. *Ibid.*, *sec.* 140 (*b*). And in this opinion, as I conceive, he is supported by the current of authority. *National Bank* vs. *Norton*, 1 *Hill's N. Y. Rep.*, 575, 578; *Sharon Canal Co.* vs. *Fulton Bank*, 4 *Paige*, 127, 129; *Washington Bank* vs. *Lewis*, 22 *Pick.*, 24.

The cases of the *Bank of the United States* vs. *Davis*, 2 *Hill's N. Y. Rep.*, 451, and of the *North River Bank* vs. *Aymar*, 3 *Ibid.*, 262, do seem to recognise the distinction, and to prove that if any one of the directors who participates with the Board in the particular transaction has notice, it is sufficient to bind the corporation, although the other directors have no knowledge thereof. But, as before said, this distinction is condemned by Mr. Justice Story, who reviews all the authorities upon the subject, and appears to me replete with mischief and insecurity to all corporations. In commenting upon the cases, the author, at section 140 (*c*), speaks of the identical case now under consideration, and inquires, in a mode clearly showing his disapprobation of the doctrine, that notice to a director who acts in the transaction will bind the corporation, "whether a mortgage made to a bank by one of its directors, or by a third person, would be affected by a prior unregistered incumbrance or other equities attaching to it, which were known at the time to such director?" And there would seem to be no doubt, from the way in which the question is put, and the whole tenor and drift of the commentaries of the writer, that he was of opinion that the bank would not be affected by such notice.

Upon the whole, then, I conclude, that even conceding Mr. Neff, as an individual, from his general knowledge of the affairs of the mortgagor, had known of, or had reason to believe in, the existence of the mortgage to the General Insurance Company, yet as that information was not communicated to him officially, for the purpose of being communicated to the Board, and as, looking at the value at which the property was estimated, there is no reason to believe the Board knew of such mortgage, there is no foundation, either in principle or upon authority, so to affect them with notice, as to subject them to the imputation and consequences of fraud, and that, consequently, the mortgage to the United States Insurance Company being the first registered, must be preferred.

I entirely concur with the Judges who have doubted the propriety of breaking in upon the policy of the Registry Acts, and shall refrain from doing so to a greater extent than required by the authorities. The cases go upon the ground of fraud in taking a deed or mortgage, and having it recorded, when the party knows of the existence of a prior deed or mortgage which has not been recorded; but as fraud is not to be imputed upon slight grounds, the party who charges it against his adversary is required upon every principle to make it out by clear and satisfactory proofs.

Some stress was laid in the argument upon a report, which Mr. Freeman says was made by a committee of the Board of Directors of the United States Insurance Company, when he applied for the loan. But he expressly says, he does not know whether Mr. Neff communicated to that committee his knowledge of the lien of the General Insurance Company on the property in controversy. He states, however, that it was down on the list at a valuation of $16,000, but what valuation the committee put upon this particular piece of property, for the purpose of the mortgage, he does not know. They took the whole property, he says, at a valuation of $137,000, free of ground-rents, as a security for two mortgages, a previous transaction of $29,000 and that for $80,000, now in controversy.

Now the property contained in the list proved to be in the handwriting of Mr. Freeman, which has been spoken of before, marked complainant's Exhibit, No. 3, and which Atkinson says he found among the papers of the Company, is put down at the aggregate value of $137,410, free of ground-rents; and in this list, this particular piece of property is valued at $16,000. And in complainant's Exhibit No. 1, which is copied from the day-book of the United States Insurance Company, and from which is excluded some items contained in the list furnished by Freeman, this same property is likewise valued at $16,000. Now in the absence of any other list or valuation, I think it may very fairly be inferred that this list, marked Exhibit No. 1, is a copy of that which was made by the committee, and that they assumed the property in question to be worth $16,000, at which Mr. Freeman put it down in his list, and which he says was the entire value of his interest in it, making no deduction for the lien of the General Insurance Company, of $15,000. Mr. Freeman says the committee made a full report, which he has seen in the book of the minutes of the daily proceedings of the Board, and that the books were kept with great regularity and fulness. And Mr. Atkinson says he has made a careful search among the books and papers of the Company, and has not been able to find any other list of the property, than the Exhibits No. 3, in the handwriting of Freeman, and the entry of which Exhibit No. 1, is a copy.

Under all these circumstances, there is certainly no reason to believe that there is any other list, or that the Committee appointed by the Board knew of the existence of the lien of the General Insurance Company. If they had known of it, it is difficult to imagine a reason for not noticing it.

Something was said in the course of the argument at the bar, upon the subject of marshalling of the securities, and it may at some future stage of the cause become necessary and proper to apply that doctrine to this case. The general principle is a familiar one, that if one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in only one of the funds for another debt, the latter

has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties. *Aldrich* vs. *Cooper*, 8 *Ves.*, 388, 395, 396; *Ex parte Kendall*, 17 *Ves.*, 520; *Cheesbrough* vs. *Millard*, 1 *Johns. Ch. Rep.*, 413.

I do not, however, propose at this time to go into any inquiry as to the applicability of the doctrine to this case, nor do I think it necessary to examine into or to express any opinion in regard to the consideration of the mortgage to the United States Insurance Company. All I mean to decide is, that assuming the consideration to be a valuable and fair one, that mortgage is to be preferred to the mortgage to the General Insurance Company.

CONSTABLE and FARNANDIS, for the United States Insurance Company.

PRATT and WALLIS, for the General Insurance Company.

JAMES KENT,
vs.
JOHN R. RICARDS ET AL.

DECEMBER TERM, 1850.

[ATTORNEYS, POWERS OF.]

AN attorney, who has a claim for collection, cannot, without the authority of his client, take a bond or anything else but money, in satisfaction of the debt.

But the power of the attorney over the conduct of the cause, is coextensive with that of his client; he may agree not to demand a judgment, or stipulate for a *cessat executio*, and any violation of this agreement will give the opposite party title to relief, as if the agreement was made with the express authority of the client.

When an appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party, and whatever is done in the progress of the cause by such attorney, is considered as done by the party, and binding upon him.

The plaintiff's attorney agreed with defendant, *first*, that the suit should not be further prosecuted until there was an ascertained deficiency in certain assignments which he received from the latter, to pay the claim against him. *Secondly*, when judgment was entered, he agreed with defendant's attorney that it should be stricken out, if objected to by defendant. And *thirdly*, when so objected to, he assured defendant the judgment should make no difference in the collection of the debts assigned, and that no execution should be issued upon it until such debts could be collected. HELD—

That it was clearly within the scope of the authority of the attorney to make this agreement, and equity will interfere by injunction, to prevent the premature enforcement of the judgment.

Equity will relieve against a judgment at law, when its justice can be impeached by facts, or on grounds of which the party could not have availed himself at law, or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with any negligence or fraud on his own part.

An answer which does not deny the averments in which the equity of the bill consists, but states "that respondent does not believe, and cannot admit that the said attorney made any such arrangement or contract as set forth in the bill," is not sufficient to dissolve an injunction.

[The following opinion of the Chancellor in this case, was delivered upon the hearing of the motion to dissolve the injunction which had been granted upon the bill of the complainant, restraining further proceedings upon a judgment which the defendants had recovered against him in Anne Arundel County Court. The grounds upon which the injunction was asked for, was an agreement made by Philip Culbreth, the attorney of the plaintiffs in the judgment (who has since left the state), with the complainant in reference thereto. The allegations of the bill in this particular, as well as the statements of the answer, are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

I have given the facts and circumstances of this case, and to the very elaborate and carefully prepared written arguments of the solicitors of the parties, the fullest consideration, and am of opinion that the entire equity upon which the injunction rests has not been removed by the answer.

It is not pretended that an attorney who has a claim for col-

lection, can, without the authority of his client, take a bond, or anything else but money, in satisfaction of the debt; and if the complainant in this case was under the necessity of maintaining such a position, he would be without any well-founded title to the aid of the Court. His case, however, is not placed upon that footing, but upon the ground that the judgment was obtained, or is about to be enforced, in violation of an agreement with the attorney of the plaintiffs at law, which, under the circumstances, he had reason to believe the former was authorized to make, and in regard to which, as I think, his authority cannot be disputed. The receipt of the attorney for the assigned claims shows that the proceeds, as collected, were to be applied in payment of the claims of the defendants against the complainant; and the correspondence between the defendants and their attorney clearly shows that they were aware of those assignments, and gave instructions in regard to their collection.

The bill, after setting forth the facts of the assignments and the institution of the suit against the complainant and his partner, charges, "that it was the distinct understanding and agreement between him and the said attorney that the suit at law should not be further prosecuted until there should be found to be a deficiency to pay off the amount thereof in the sums assigned." "That the complainant refused to give judgment in the suit against him, and left town, believing no such judgment would be entered." "That afterwards, and at the said term, the attorney of the plaintiffs at law agreed with the attorney of the complainant that he would take a judgment, with the distinct understanding, that if the plaintiff objected thereto it should be stricken off, and that upon this understanding the judgment was given." "That as soon as the complainant knew that the judgment had been rendered, he saw the plaintiffs' attorney in relation thereto, and objected to it, and required that the same should be stricken out, when the attorney stated that the judgment should make no difference in his course in the collection of the debts assigned; that his clients were perfectly satisfied with the assignments, and would wait

until they were collected, or could be collected, and assured the complainant that no issue should be made of execution on the said judgment until he could have time to collect the debts so assigned and transferred to the plaintiffs at law." "That relying on these assurances of the attorney, he, the complainant, did not require the said judgment to be stricken out, as he had a right to do."

Now these averments, which constitute the substantial equity of the bill, have not been, and probably in the very nature of things they could not be, positively denied by the answer, and the effect of the argument, therefore, has been to show that the attorney, in making such an arrangement, (if he did make it,) transcended his authority, and that his clients are not bound by it.

But it will be at once perceived that this is a very different question from that touching the power of an attorney to receive a bond, or anything else but money, in payment of a debt due his client, without his assent. The question here has reference to the power of an attorney over the conduct of the cause, and it is believed to be indisputable that his authority in this respect is co-extensive with that of his client. No one will deny that an attorney may agree not to demand a judgment, or may stipulate for a *cessat executio* upon a judgment, when rendered, and that any violation of his agreement, in either of these particulars, will give the opposite party the same title to relief as if the agreement was made with the express authority of his client.

It was decided by the Court of Appeals, in the case of *Henck* vs. *Todhunter*, 7 *H. & J.*, 275, "that by the law and the practice of the Courts of this State, a party might appear either *in propria persona* or by attorney; and whenever the appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party, and whatever is done in the progress of the cause by such attorney, is considered as done by the party, and binding upon him;" "and whether the attorney is faithful to his trust or not is a

matter between him and the party, his client, to whom he is responsible for the faithful discharge of his duty."

Now the agreement charged in this case has direct reference to the conduct of the cause, and comes clearly within the scope of the authority of the attorney, thus distinctly announced by the Court of Appeals. The agreement between the complainant and the attorney of the plaintiffs at law was, *first*, that the suit at law should not be further prosecuted until there was an ascertained deficiency of the assignments to pay the claim. *Secondly*, that when the judgment was entered, the attorney of the plaintiff agreed with the complainant's attorney that if he, the complainant, objected to the judgment, it should be stricken out; and *thirdly*, that when the complainant did object, his objection was obviated by the assurance of the plaintiff's attorney that the judgment should make no difference in his course in the collection of the debts assigned, and assured the complainant that no execution should be issued upon the judgment until the assignments could be collected, and that time should be allowed for that purpose. It seems to me that, assuming the existence of this state of facts, there can be no doubt of the power of this Court to interpose to prevent the premature enforcement of the judgment. If the facts are true, as charged in the bill, the attorney of the plaintiff at law not only took a judgment contrary to his express agreement with the complainant at law, but prevented the latter from applying in due time to the County Court to have it stricken out, by assuring him it should not have the effect of varying their said agreement in any manner whatever. It is believed to be quite clear that if an application had been made to the County Court to strike out this judgment within the time allowed by law and the practice for such motions, and the Court had been satisfied of the truth of the statements contained in this bill, that the application could not have been denied. But the complainant was prevented from making such motion, by an assurance that the judgment should not be used to his prejudice, and that the agreement in reference to the claims assigned should be fully and fairly carried into execution, and hence his right to the aid

of this Court, where alone he can now have redress. This case seems to me to fall directly within the principle so often decided by the Courts, that a Court of Equity will relieve a party against a judgment at law, when its justice can be impeached by facts, or on grounds of which the party seeking the aid of Chancery could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with any negligence or fraud on his own part. *Gott & Wilson* vs. *Carr*, 6 *G. & J.*, 309. Certainly in this case, if the averments of the bill are true, the complainant was prevented from making his defence at law by the act of the attorney of the opposite party, and no such negligence can be imputed to him as will deprive him of the title to come here for relief.

The answer to this bill does not profess to deny the averments in which the equity consists. After admitting that the attorney of the respondent did receive from the complainant sundry causes of action for collection, the answer proceeds to say, "but this respondent does not believe, and cannot admit, that the said attorney made any such arrangement or contract in relation thereto as is set forth in the said bill." That such an answer is not sufficient to dissolve an injunction is conclusively shown by the case of *Doub* vs. *Barnes et al.*, 4 *Gill*, 1.

I am therefore of opinion, the injunction must be continued, and shall so order. But in coming to this conclusion, I do not mean to be understood as intimating any opinion with regard to the question so much controverted, whether the assignments were to be collected at the risk of the complainant or the defendant. I leave that question for further consideration, when the cause comes up to be heard upon the merits.

A. RANDALL, for Complainant.

A. B. HAGNER, for Defendant.

ROBERT J. YOUNG AND WIFE,
vs.
LOUIS MACKALL, JR., ET AL.

DECEMBER TERM, 1850.

[LIMITATIONS—PROOF OF CLAIMS—CHANCERY PRACTICE—TRUSTS.]

AN express promise to pay the debt will not revive the remedy, upon a bond barred by the statute; though upon such promise suit may be maintained, and the bond, though over twelve years standing, may be offered in evidence, as the inducement to, or consideration of, the promise.

When a claim is founded upon a lost instrument, evidence of the loss must be first offered, and then a copy, or parol evidence of its contents, may be used: the existence of the original must be first proved before a copy is admissible.

A judgment was rendered for the penalty of the bond sued upon, to be released upon payment of such sum, as certain persons named should say was due. HELD—That this was a final, and not an interlocutory judgment, and could be set up as a claim against the estate of the defendant, though the referees did not ascertain the sum due until after his death.

The judgment was final, and to make it absolute, no further action of the Court was necessary: the filing of the certificate of the referees was all that was required for the purpose.

Where proof is taken, under an order of Court, and the notice was, that depositions would be taken on a certain day at a certain place, and they do not appear upon their face to have been taken at the *place* designated, they are not admissible in evidence.

A claim was set up against the proceeds of the real estate of a deceased person, sold for the purpose of partition amongst his heirs-at-law, founded upon two single bills executed by the deceased, and which, at the time of their filing, were barred by limitations. To remove this bar, a bill in equity by the executor of the obligee, and the answer of the deceased admitting the existence of the single bills, and expressing his willingness to settle upon certain conditions, filed more than nine years before the filing of this claim, were offered in evidence. HELD—That this was not sufficient to remove the bar of the statute, pleaded by one of the heirs-at-law of the deceased.

The action upon a promise to pay a debt, which is barred by the statute, must be in *assumpsit;* and to such an action, three years is a bar.

Trusts, which are not affected by the statute of limitations, are those technical and continuing trusts, which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of Courts of Equity.

But where the jurisdiction is concurrent, and the party is at liberty to pro-

ceed in either Court, the statute is equally a bar in both; and in all such cases, equity adopts, by analogy, the time prescribed by law.

As soon as the cause of action accrues, whether it be the case of a trust or not, if it be a fit subject for a suit at law as well as in equity, the statute of limitations begins to run.

The statute may be pleaded, as a defence, at any time after the claim has been filed; or brought before the Court, either before the case has gone to the Auditor, or after he has made a report on it.

[The real estate of Thomas Mackall, deceased, was sold under the proceedings in this case for the purpose of partition among his heirs-at-law, and claims were filed by various parties against the proceeds. These claims are disposed of in the following opinions of the Chancellor. Claim No. 1 is founded upon a judgment recovered against the said Thomas Mackall, by Joseph W. Reynolds, and is presented by the executors of the latter. The objections to this claim are fully stated in the first opinion of the Chancllor. No. 2 is a single bill for $629 69, executed by the deceased to his sister, Anne R. G. Mackall, on the 22d of March, 1833, and payable two years after date, with interest from date. No. 5 is founded upon the copy of a single bill, the original of which was alleged to be lost; executed by said Thomas Mackall, in favor of his said sister, Anne R. G. Mackall, for $705 65, dated the 15th of July, 1837, payable in three years from date. In support of this claim was offered a certificate by Thomas Mitchell, for William Hance, clerk, certifying, that on the 15th of July, 1837, Thomas Mackall deposited in the Clerk's Office of Calvert County a note of that date, drawn by him in favor of Anne R. G. Mackall, for the sum of $705 65, payable three years after date, with interest from the 9th of April, 1833, and the deposition of Augustus R. Sollers, Clerk of Calvert County Court, taken before a justice of the peace, stating that he had, at the request of the attorney of Miss Anne R. G. Mackall, made frequent and repeated searches among the papers in his office, for the purpose of finding the note of Thomas Mackall, referred to in the certificate of William Hance, former Clerk of said Court, and that he has been unable to find the said note, and he believes the same to be lost or mislaid. No. 6 is

an open account against said Thomas Mackall, in favor of the said Anne R. G. Mackall, for the hire of negroes, commencing January 1st, 1834, and ending January 1st, 1837, amounting to $519 84. Various depositions were taken in support of these three last claims, and in order to rescue them from the plea of limitations pleaded against them by Louis Mackall, Junior, one of the heirs-at-law of the deceased. The purport of these depositions, and the objections to them, are fully stated by the Chancellor. The other claims in dispute, and the proof in their support, as well as the proceedings in the case, will also be found in the opinions.]

THE CHANCELLOR:

This case standing ready for further directions, on the objections to the claims of the creditors, and on the exceptions to the Auditor's report, and being submitted on behalf of Louis Mackall, Jr., under the order of the 20th of June last, and upon arguments in writing, of his solicitor, the proceedings have been read and considered.

This case presents for consideration, among others, the exceptions taken by said Mackall, to claims numbered 4, 5, and 6. The Auditor reports that claims Nos. 4 and 6 are barred by limitations, and that the last is not proved, though the first is. No. 5 he reports not barred and fully proved.

The counsel for Mackall controverts the conclusions of the Auditor in part, insisting that all of these claims are barred, and that none of them are proved either by the evidence in the cause at the time the Auditor made his report, or by that subsequently taken. Full proof of these claims being demanded by Mackall, and the act of limitations being relied on by him, it becomes necessary to inquire whether the plea is applicable, and the proof required furnished.

No. 4 professes to be founded upon the single bill of the deceased, Thomas Mackall, dated the 22d of March, 1833, payable two years after date, and was filed on the 4th of November, 1847. The debt or thing in action had, therefore, been above twelve years standing, when the claim was filed, and the

instrument consequently, by the terms of the Act of Assembly, could not be pleaded or given in evidence. The evidence of George Denton, filed on the 20th of June last, assuming it to have been regularly taken (which I do not decide), does not in my opinion exempt this claim from the operation of the statute. He proves he heard the deceased say he owed his sister a sum of money. But the decisions of the Courts are conclusive to show that evidence of this kind is not sufficient. Nay that even an express promise to pay the debt will not revive the remedy upon the bond, barred by the statute, though upon such promise suit may be maintained, and the bond, though over twelve years standing, may be offered in evidence as the inducement of the promise. *Veasey* vs. *Bassett*, 7 *H. & J.*, 461; *Lamar* vs. *Manro*, 10 *G. & J.*, 50. This claim, therefore, is barred as against the party relying upon the statute.

The Auditor reports claim No. 5 as not barred, and as fully proved, but in this, I think, as the proof now stands, and in opposition to the exceptions to its admissibility, he is in error. Though the certificate of Thomas Mitchell, and the deposition of Sollers, together with the deposition of Anne R. G. Mackall, may have been sufficient before their admissibility was excepted to, they are not now, in my opinion, being excepted to, such proof as the law required. The certificate of Mitchell, and the deposition of Sollers are *ex parte*, and the former is not under oath. When a claim is preferred, founded on a lost instrument, evidence of the loss must be first offered. When that is done, a copy or parol evidence of the contents of the paper may be used, but you must first prove the existence of the original, for you cannot offer in evidence a copy, without previously showing that the instrument of which it purports to be a copy, existed as a genuine instrument. 1 *Stark. on Ev.*, 340, 341. Now it may be, and I am not prepared to say otherwise, that the proof exhibited (though full proof was demanded) would have been sufficient to establish the claim, if exceptions had not been filed to it. But these exceptions were not filed until the 20th inst., and the creditor, relying

upon the report of the Auditor, and seeing no exceptions to the admissibility of the proof, may well have supposed the claim would be allowed. The claim, with all the evidence in support of it, was filed on the 21st of March, 1849. The report of the Auditor allowing it was filed on the 13th of February, 1850, and it is not until the 20th of July, 1850, the day fixed for the hearing, that the admissibility of the proof is excepted to. Under these circumstances, I think justice requires that some further time be given to establish this claim.

No. 6 is barred by limitations, and must be rejected so far as the objecting party is concerned.

The exception to claim No. 1, being the claim of the executors of Joseph Reynolds, I do not think well taken. The claim is founded upon a judgment against Thomas Mackall, rendered at March Term, 1833, and revived by *scire facias* at March Term, 1844. The judgment was for the penalty of the bond sued upon, to be released on the payment of such sum as certain persons named should say was due; and it is contended, that because these persons did not ascertain the sum due until after the death of Mackall, no use can be made of the judgment here. In other words, the objection I presume is, that the judgment was only interlocutory, and that a final judgment could not be rendered after the death of the defendant. But this is an error. The judgment was final, and to make it absolute no further action of the Court was necessary. The filing of the certificate of the parties authorized to ascertain the sum, upon payment of which the judgment was to be released, was all that was required for the purpose. *Turner* vs. *Plowden* 5 *G. & J.*, 52. The exception to this claim will therefore be overruled.

[The Chancellor then passed an order, referring the cause to the Auditor, the terms of which are stated in the following opinion, delivered upon a further hearing of the case.]

THE CHANCELLOR:

In the order passed by this Court on the 27th of July, 1850,

this cause was referred to the Auditor, with directions to state a final account, in which the plea of limitations as against claims numbered 4 and 6, was to be allowed in favor of Louis Mackall, Junior, the party relying upon the plea. And with reference to claim No. 5, that likewise was to be excluded so far as said Louis Mackall was concerned, unless it should be sufficiently proved at the time of stating the account, and for the purpose of enabling the claimant to supply the required proof, depositions upon the usual notice were authorized to be taken and filed in the Chancery office, on or before the 20th of the ensuing September. No proof having been taken under this authority, the Auditor has excluded the claim, and one of the questions now submitted for decision, is whether he was right in doing so.

It certainly was the opinion of the Court, when the former order was passed, that the proof in support of this claim was insufficient, and the Auditor was quite right, therefore, in excluding it, no additional evidence being offered in its support. I do not now understand it to be contended by the counsel for the claimant, that the *ex parte* deposition of Mr. Sollers is admissible, and it appears to me too plain for argument, that the certificate of Mr. Mitchell standing alone (conceding it to be admissible for any purpose which may, perhaps, be well doubted), is sufficient to establish this claim, because it does not establish the indispensable fact that the single bill ever existed as a genuine instrument.

And I may also now take occasion to say, as not wholly inappropriate, in view of the argument which has been made on behalf of the claimant, that I am quite satisfied that none of the depositions filed in support of these claims, 4, 5, and 6, are admissible. That of Dr. Parker is clearly inadmissible, as having been taken without notice, or anything that can be considered as amounting to notice; and those of Denton and Somerville not appearing to have been taken according to notice. The notice was that the depositions would be taken on the 12th of June, 1850, at the hour of 12 o'clock, M., at the *residence of John Somerville*, and although they appear

upon their face to have been taken on the *day mentioned*, they do not appear to have been taken *at the place* designated in the notice, which in my opinion is a fatal objection. I am not by any means prepared to say that it should appear upon the face of a deposition, that it was taken at the *hour* mentioned in the notice. In the case of *Calvert* vs. *Coxe*, 1 *Gill*, 95, the defendant was notified that the deposition of Mr. Swann would be taken at his dwelling-house on a day mentioned, between the hours of 12 at noon, and 6 in the afternoon; and the return of the commissioners stated that they had taken the depositions on the day mentioned, and at the place mentioned, but without saying between the hours designated in the notice, was held to be sufficient, and the deposition was admitted.

But in the case of *Collin's, lessee*, vs. *Elliott*, 1 *H. & J.*, 1, the General Court decided "that it ought to appear by the depositions themselves that they were taken agreeably to notice, both as to *place* and *time*, or they cannot be received as evidence, and that proof could not be admitted to show that they were in fact taken according to notice," and this decision was, on appeal, affirmed by the Court of Appeals. Sustained by this authority, and by the reason of the thing, I am of opinion, that the exceptions to the depositions of Denton and Somerville are well taken, and that they cannot be read in evidence.

This disposes of the case, except with regard to claim No. 45, which was not noticed in the former report of the Auditor, under an impression that it was the same as claim No. 4. It turns out now to be a different claim, and is set up by Robert J. Young, administrator *d. b. n. c. t. a.*, of Anne Mackall, and is founded upon the two sealed notes of the deceased, Thomas Mackall, one of which bears date the 24th of December, 1829, and payable on the 24th of December, 1834, and the other on the 22d of March, 1833, and payable on the 22d of March, 1835. These claims were filed on the 24th of October, 1849, being more than fourteen years after the maturity of the last of them, and they are consequently barred by limitations, pleaded against them by Louis Mackall, Junior, unless there be

found something in the record to rescue them from the operation of the plea.

It appears that on the 26th of August, 1839, Joseph W. Reynolds, as executor of Anne Mackall, filed his bill in this Court against the said Thomas Mackall, charging, among other things, that these two sealed notes had, upon the death of the said Anne, come into the possession of the said Thomas, which he had retained and converted to his own use, and praying for a discovery, and an account, and for general relief. Thomas Mackall answered this bill on the 26th of February, 1840, in which he admits his being in possession of the notes referred to, explains the manner in which he acquired the possession, and exhibiting copies of the notes, offers to deliver them up to the complainant, Reynolds, upon his settling with him for his distributive share, as a legatee under the will of the said Anne Mackall, who was his sister. No further proceedings appear to have been had in that case, which abated by the death of the complainant, Reynolds, in 1842; and the question now is, whether the answer of Thomas Mackall to this bill precludes Louis Mackall, Junior, claiming, as one of the heirs-at-law of said Thomas, from relying upon the plea of limitations in the case now under consideration?

The question is not whether, if the suit instituted by Reynolds had been revived and carried on, Mackall's representatives would have been permitted to put in the plea of limitations after he had in his answer, upon the terms therein mentioned, offered to surrender the two notes, and come to an adjustment, but whether, in this case, which is a proceeding to sell the real estate of Thomas Mackall, for the purpose of making partition among his heirs-at-law, one of those heirs may not defend his proportion of the proceeds of the estate against this claim, by interposing the plea?

The bill filed by Reynolds, and the bill in this case, are entirely distinct proceedings, having no sort of relation to, or connection the one with the other. And the bill, and the answer in the former case, can only be used as evidence in this. It cannot be used as an estoppel here, however it might operate

in the cause in which the answer was filed. Here the answer is evidence, and evidence only, and establishes nothing more than the existence and genuineness of the notes in question, and the willingness of the defendant, at that time, to give them up to Reynolds, and settle with him, upon receiving his share of his sister's estate.

But this answer, containing these admissions, and expressing a willingness thus to settle, was filed on the 26th of February, 1840, and from that time until the 24th of October, 1849, a period of upwards of nine years, nothing has been done. Considering the answer of Thomas Mackall as evidence, and amounting to an admission of the genuineness of the notes, and even an absolute promise to pay them, it could have no greater effect than to give a right to sue on the promise, and to offer the notes in evidence, as a sufficient inducement or consideration for it. It could not revive the remedy upon the sealed notes, when barred by the statute of limitations, as has been repeatedly adjudicated by the Court of Appeals, as shown by the authorities cited in the former opinion. The action upon the promise must be in *assumpsit*, and three years bars such an action; and consequently, as more than nine years have elapsed from the filing of the answer containing the promise (if it does contain one), to the filing of the claim in this case, the statute, in my opinion, is a bar.

Considerations of hardship have been pressed upon the Court, and to such considerations, when at liberty to listen to them, I by no means profess to be insensible. But I sit here not to make, but to administer the law, according to my best judgment, as I find it enacted by the Legislature, or settled by the Courts; and believing that this claim is obnoxious to the plea of limitations, which has been relied upon by one of the representatives of Thomas Mackall, and having no power to deny him a right which the law gives him, it is my duty to give him the benefit of his plea. The propriety of relying upon it is for him, and not for me, to decide.

It has been urged in the argument, that upon these transactions between Thomas Mackall and his sisters, Ann and Anne

R. G. Mackall, there is impressed the character of a trust, and that for that reason they are not liable to be defeated by the plea of the statute of limitations. I am firmly convinced, however, that this position cannot be maintained. The whole doctrine upon this subject of trusts was most elaborately discussed by Chancellor Kent, in the case of *Kane* vs. *Bloodgood*, 7 *Johns. Ch. Rep.*, 90, who, after a critical and searching examination of the authorities, came to the conclusion, that "the trusts intended by the Courts of Equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of Courts of Equity." The rule deduced by the Chancellor from a review of the authorities in that case is, "that the trusts which are not within the statute are those which are the creations of the Court of Equity, and not within the cognizance of a Court of Law; and that as to those other trusts which furnish causes of action at law as well as in equity, the statute is, and in reason ought to be, as much a bar in one Court as the other; that is, when the jurisdiction is concurrent, and the party is at liberty to proceed in either Court, as in cases of account, where a bill for an account may be brought in equity, or an action of account at common law, the statute is equally a bar in both Courts. In all such cases, the Courts of Equity, though not within the words of the statute, adopting by analogy the time prescribed by the Legislature as a fit and just period as a bar in equity." And in the case of *Kane* vs. *Bloodgood*, a bill for dividends in an incorporated company was adjudged to be barred by the statute, not having been brought within six years after the right of action accrued, that being the period of limitations at law. Equity in that case, acting by analogy, and in obedience to the statute, and, as the Chancellor declared, upon established principles which could not be disregarded.

The principle settled by the case of *Kane* vs. *Bloodgood*, so far from being shaken, is affirmed by the Court of Appeals of this State in *Green and Wife* vs. *Johnson and Wife*, 3 *Gill & Johns.*, 389. The clear doctrine of this last case is, that so

soon as the cause of action accrued, whether it be the case of a trust or not, if it be a fit subject for a suit at law as well as in equity, the statute of limitations begins to run. A trust, to be exempt from the operation of the statute, must be a continuing subsisting trust. When it ceases so to be, or expires by its own limitation, or is put an end to by the act of the parties, and is cognizable at law as well as in equity, it is exposed to the operation of limitations to the same extent as if the exclusive jurisdiction was at law.

Now, tested by this principle, what becomes of the objection to the operation of the statute in this case? Is it possible successfully to maintain that the dealings between Thomas Mackall and his sisters gave rise to one of those trusts which fall within "the proper, peculiar, and exclusive jurisdiction of Courts of Equity?" That out of those transactions there springs a technical continuing trust, the mere creature of a Court of Equity, and not within the cognizance of the Courts of Law? For unless this be the case, the selection of a Court of Equity for the assertion of the claims, will not save them from the effect of the statute. The claims in question are founded, some of them, upon the sealed notes of Thomas Mackall, payable to his sisters, and one of them on an open account for negro hire. Can it be possible to contend that actions at law might not have been brought upon these, and upon the open account against Thomas Mackall? That upon maturity of the notes, and the expiration of the time for paying the hire, the causes of action at law were not complete, and suits at law might not have been maintained? Why, assuming that there was a trust originally (which assumption, however, I by no means admit to be correct), did it not expire by its own limitation when the notes fell due? And can any one doubt that the Courts of Law could have entertained jurisdiction to enforce the payment of the money? So far from doubting the jurisdiction of the common law Courts, is it not quite clear that they were the proper and peculiar Courts to be resorted to, and that Courts of Equity would have refused to interfere, unless some special grounds, not inherent in the contracts themselves, could have been shown?

I am, therefore, of opinion that these claims cannot be saved from the operation of the statute upon this ground.

Some discussion was had at the bar with reference to the effect of an agreement, signed by the counsel of Louis Mackall, Jr., and the executor of Ann R. G. Mackall, and filed on the 17th of October, 1849. Prior to this agreement, that is, on the 21st of the preceding July, an order had been passed, ratifying so much of the report of the Auditor of the 17th of the preceding month of May, as related to her claims, numbered 3, 5, and 6, and to the balances distributed to the heirs-at-law of Thomas Mackall; and, by the agreement in question, which admitted that these claims were allowed, with the assent of the counsel for said Louis Mackall, Junior, under an erroneous impression that the objections of his client to said claims had been removed, it was among other things agreed, that so much of the Chancellor's order as related to said claims should be rescinded, and that such claims should stand as before such order; and, therefore, on the same day an order passed accordingly.

It is insisted now, that, upon the true construction of the stipulation, "that the said claims should stand as before such order," the defendant, Louis Mackall, Junior, cannot be permitted to rely upon the plea of limitations. Such, however, is not my understanding of the effect of this agreement. The agreement, and the order of the Court passed in pursuance of it, placed these claims in the same situation, in all respects, in which they stood before the order of the 31st of July, 1849, ratifying as to them the report of the Auditor, and if, prior to the passage of that order, they were liable to the plea of limitations, they became equally liable when it was rescinded, because, by the terms of the agreement, they were to stand as they stood before the order. The case of *Welch* vs. *Stewart*, 2 *Bland*, 42, states, I think, the rule correctly, and shows that the statute of limitations may be presented as a defence at any time after the claim has been filed or brought before the Court, either before the case has gone to the Auditor, or after he has made a report on it.

But suppose the ground now taken by the solicitors of Ann

R. G. Mackall be correct, and these claims are to stand or fall upon the pleadings and proofs as they stood at the time of the agreement, and when the order upon it passed, how could that benefit the executor? If the agreement precluded the one party from interposing a new objection to the claim, it must have the effect also of precluding the other party for offering new proof in its support. The stipulation must certainly be mutual and reciprocal, and binding upon both parties or upon neither. It never would do to say to Louis Mackall, Junior, you shall not be permitted to set up a new defence to these claims, but the opposite party shall be at liberty to sustain them by additional evidence. If the claims are to be finally passed upon by the Court precisely as they stood when the agreement was filed, and order upon it passed, then their fate must depend upon the state of the proof at that time.

It cannot be doubted that Louis Mackall, Junior, had a right, notwithstanding the agreement, to insist that the claims were not proved, and to call upon the Court to say whether they were fully proved or not. This he did by his exceptions filed on the same day with the agreement, and at the same time he insisted on the defence of limitations. Now, conceding, for the sake of the argument, that the plea of limitations should be shut out in consequence of the agreement, and that these claims are to be allowed or rejected according as they stood at the time, they must inevitably be rejected, there being no pretence that they were *then proved.* The evidence relied upon to sustain them having been subsequently taken and returned to this Court, on the 20th of June, 1850, eight months after the agreement was filed, it would be strange, indeed, if the holder of these claims could be permitted to rely upon the proof taken since the order, when he insists that, according to the order, the parties were required to abide the judgment of the Court as the claims stood at the time, and, of course, upon the proof then in the case.

The report of the Auditor of the 25th of November, 1850, is approved of, in so far as it excluded No. 5, and the other claims excluded, except claims 40 and 41, the objections to which have been withdrawn, as not proved, or as otherwise

barred, and in so far as it gives to Louis Mackall, Junior, the benefit of the plea of limitations, relied upon by him as against claims Nos. 4 and 6. But the said report is not approved of, in so far as it allows claim No. 45 as proved and not barred, it being my opinion, for the reasons stated, that it is barred by limitations, and that the benefit of the statute of limitations must be given to Louis Mackall, Junior, the party relying upon it.

RANDALL, for the Claimants.
ALEXANDER, for the Exceptant, Louis Mackall, Junior.

BASIL D. SPALDING,
vs.
GEORGE BRENT ET AL.
——
JOHN SPALDING ET AL.
vs.
GEORGE BRENT ET AL.

DECEMBER TERM, 1850.

[RECEIPTS IN DEEDS—VENDOR'S LIEN.]

IT is a settled principle, in this State, that the receipt in a deed is only *prima facie* evidence of the payment of the purchase-money, and may be explained or contradicted by parol.

Such receipts are inserted more for the purpose of showing the actual amount of consideration, than its payment; and if the money is not paid, they are intended to mean, that the specified amount had been assumed by note, or otherwise.

The fact that the grantor has in his possession a single bill of the grantee, given to secure the payment of the purchase-money for the land conveyed, is sufficient to countervail the receipt in the deed.

Arbitrators, selected by children to ascertain their respective proportions of the real and personal estate of their father, made an award on the 18th of March, 1835, valuing said estates at $9,737 75; and that the share of B. S., one of the children, was $2,516 65; and that upon payment by G. S. of the shares of his co-heirs, they should convey to him the real estate and release the personalty. G. S., executed to B. S., his single bill for $2,163 27, without date, but bearing interest from the 29th of January, 1835; and on the 2d of May, 1836, B. S. gave to G. S. a receipt, stating

that he had received of the latter "a *full consideration* for his entire interest in his late father's estate." HELD—

That, in view of its terms, and the fact that B. S. retained in his possession the single bill referred to, this receipt cannot have the effect to defeat the claim of B. S. for this debt, and he is, to the extent of his share of the realty, an unpaid vendor thereof, and has a right in equity to pursue the estate or its proceeds, as against the vendee or volunteers claiming under him or his judgment and general creditors.

Where parties stand to each other in the relation of guardian and ward, or *quasi* guardian and ward, every reasonable intendment should be made for the benefit of the ward, in the construction of transactions or contracts between them, occurring soon after the termination of that relation.

[The real and personal estate of George R. Spalding, deceased, was sold under the proceedings in this case, for the purpose of paying his debts; and the claim against it of Basil D. Spalding, is considered and decided upon by the Chancellor, in the following opinion, in which all the facts relating to the claim, are fully stated.]

THE CHANCELLOR:

This case has been argued upon the exceptions of John Spalding and others, complainants in the second of the above causes, and of Basil D. Spalding, the complainant in the first cause, to the reports and accounts of the Auditor; and the only question which I now purpose to consider, has reference to the claim of Basil D. Spalding, and relates to the extent and character of that particular claim, which is designated as claim No. 5, by the Auditor.

It appears, by the proceedings, that certain persons selected as arbitrators by the children and heirs-at-law of George H. Spalding (of whom George R. Spalding and Basil D. Spalding were two, the former, in the submission, acting as the next friend of the latter), for the purpose of ascertaining the respective proportions of said children, of the real and personal estate of their said father, then in the hands and possession of the said George R. Spalding, made their award on the 18th of March, 1835, by which they determined, that the value of the entire real and personal estate was $9,737 75, and that

the share or proportion of Basil D. Spalding of this sum, was $2,516 65. And the arbitrators further awarded, that, upon the payment, by George R. Spalding, of the shares of his co-heirs thus ascertained, they should each convey to him their title to the real estate of their father, and release their interest in his personal estate.

It further appears, that George R. Spalding executed and delivered to the said Basil D. Spalding, his single bill for $2,163 27, without date, though upon the face of it, bearing interest from the 29th of January, 1835; and by a paper, filed by the defendant, it appears that on the 2d of May, 1836, Basil D. gave to George R. Spalding, a receipt in the following terms: "Received of George R. Spalding, a full consideration for my entire interest in my late father's estate; and do acknowledge myself content with my late mother's will, and do abide thereby." There is also in the record, a deed, dated the 18th of August, 1837, purporting to have been executed by the heirs of George H. Spalding, conveying to the said George R. Spalding for the consideration of $5,000, as therein expressed, all the interest of the grantors in the real estate of their said father. The genuineness of this deed, so far as relates to all the grantors but Basil D. Spalding, is not controverted. As to him, it is disputed; and independent of the parol evidence, the weight of which is against the deed, so far as he is concerned, there are upon its face marks of suspicion, which, if it were absolutely necessary to decide upon its genuineness, would press heavily in the scale against it.

As, however, I do not think, conceding that the deed was executed by Basil D. Spalding, that it is sufficient to accomplish the purpose for which it was introduced, I do not deem it necessary to express a final opinion in regard to it.

This deed contains an acknowledgment in the body of it of the receipt by the grantors of the consideration-money; and there is, moreover, a receipt, purporting to have been signed by them, appended to it. And this receipt, and that of the 2d of May, 1836, before referred to, are relied upon by the complainants in the first case, as evidence of the full and en-

tire payment of the claim of Basil D. Spalding, and upon the strength of which they seek to exclude him from all participation in the fund.

It is an acknowledged principle, in this State, whatever diversity of opinion may exist elsewhere, that the receipt in a deed is only *prima facie* evidence of the payment of the purchase-money, and may be explained or contradicted by parol. *Wolf* vs. *Hauver*, 1 *Gill*, 84. In that case, the Court quote with approbation the following language in the case of *Gully* vs. *Grubbs*, 1 *J. J. Marshall*, 388: "The acknowledgment in a deed of the receipt of the purchase-money, is only *prima facie* evidence, and is inserted more for the purpose of showing the actual consideration, than its payment; and it is, in general, inserted in deeds of conveyance, whether the consideration has been paid or agreed to be paid." "If the consideration had not been paid, such an acknowledgment in a deed would be intended to mean, that the specified amount had been assumed *by note or otherwise.*"

These remarks, in the propriety of which the Court of Appeals express their concurrence in the case referred to, seem to me to be a complete answer to the objections to this claim, founded upon the acknowledgment and receipt for the purchase-money contained in the deed. Basil D. Spalding has in his possession the single bill of his brother, George R. Spalding, for $2,163 27, and, assuming that this obligation was given to secure the payment due the former from the latter for his proportion of the estate of their father, it is evidence sufficient to countervail the acknowledgment in the deed, which, say the Court, "is in general inserted in deeds of conveyance, whether the consideration has been paid or agreed to be paid."

The single bill is an agreement in the most solemn form, to pay the money expressed in it, and must prevail against the mere *prima facie* evidence furnished by the deed. If, in truth, George R. had paid Basil the amount of this single bill, it is certainly difficult to believe he would not have required the redelivery to him of his obligation, and his not having done so,

is in my judgment quite strong enough to destroy a species of evidence so weak and inconclusive as that opposed to it.

The receipt of the 2d of May, 1836, in view of the fact that Basil D. Spalding retained in his possession the single bill of his brother, and the terms in which the receipt is couched, cannot be permitted to have the effect of defeating the claim. It does not profess to have been given for money paid, makes no reference whatever to the obligation in question, but is a mere acknowledgment on the part of Basil D. Spalding, that he had received a full consideration for his interest in the estate of his father. Now it may very well be that he considered the single bill of his brother then delivered to him, or already in his possession, as a full consideration. This obligation was a solemn and binding agreement to pay the money, and might well have been regarded as a satisfactory consideration, not only for the deed, but for the receipt. It would, to be sure, have been more prudent, and more according to the cautious and careful mode of doing business which persons of experience observe, if he had displayed upon the face of the paper the nature of the consideration received by him. But when it is remembered that George R. Spalding, the party to whom it was given, had undertaken to act as the guardian of his brother Basil, a construction upon their transactions unfavorable to the interests of the latter will not be adopted. It is fairly to be inferred from the record, that at the date of this receipt, Basil was scarcely *sui juris*, and in every transaction between him and the person who had acted as his guardian, the Court, if ambiguity or mystery surrounds it, will indulge in no conjecture injurious to the ward. It is for the guardian to offer the explanation and disperse the cloud, and unless he does so, the interpretation must be against him.

It has been remarked, as a circumstance of much force, and strongly tending to show that the money secured by the single bill was not paid when the receipt was given, that the party taking the receipt did not require the surrender of his obligation. But assuming that his carelessness in this respect is not entitled to the weight imputed to it, surely the omission in the

receipt of any reference to the single bill is very significant. It cannot be supposed that a man of ordinary prudence would not only, when paying his bond or note, omit to take it up, but leaving it in the hands of his creditors, he would take his receipt, making no allusion whatever to it.

I cannot in this case impute such indiscretion to George R. Spalding, and therefore am of opinion that his debt to his brother has not been paid. The next question has reference to the amount of this debt.

According to the award of the arbitrators, dated the 18th of March, 1835, his proportion of the real and personal estate of his father, to be paid by his brother George R. Spalding, was ascertained to be $2,516 65, but the single bill of his said brother to him is for $2,163 27, with interest from the 29th of January, 1835. This latter paper has no date, and we are left to conjecture the period of its execution; and I think it quite reasonable to presume, it was executed and delivered on the day of the date of the receipt of the 2d of March, 1836. It is not at all improbable that between the date of the award and of the receipt, a settlement of accounts had taken place between these parties, and that the sum ascertained to be due by the arbitrators had in some way been reduced to the amount stated in the single bill. Indeed, the record furnishes evidence that there were dealings between them, and that George R. Spalding, who was *quasi* guardian to his brother, had made advances to and supplied him with necessaries. Under these circumstances, we may well suppose that the note was given for the precise balance then due, and I therefore am of opinion, that the amount therein expressed must be taken as the extent of the indebtedness of George R. Spalding, and that Basil must be regarded as his creditor for that sum, and no more.

Being then of opinion, for the reasons briefly stated, that Basil D. Spalding is a creditor of the estate of his brother, George R. Spalding, and having fixed the amount of his claim, the only remaining question to be decided at this time, relates to the character of the claim.

It is insisted by his counsel that he is an unpaid vendor of

real estate, and has a right in equity to pursue the estate or its proceeds as against the vendor or volunteers claiming under him, or his judgment or general creditors. And this proposition is too firmly established by authority to be successfully disputed. *Sections* 1218 *and* 1228, *in* 2 *Story's Eq.*, and the case of *Repp* vs. *Repp*, 12 *G. & J.*, 341, are entirely conclusive of the question. Indeed, the counsel on the other side has not controverted the principle, but seeks to escape its operation, by showing the difficulty, if not the impracticability, of applying it under the peculiar circumstances of this case.

This debt, as appears by the award, was partly for real, and partly for personal estate, and there is nothing upon the face of the award to show what amount of either constituted the sum total of the claim. The difficulty, then, is in segregating its component parts, and ascertaining what proportion of the entire indebtedness is on account of the interest of Basil D. Spalding, in the real estate of his father, for beyond that proportion, of course, he can have no pretence for claiming the benefit of the vendor's lien. There is, no doubt, some difficulty upon this point, but in view of the relation which these parties bore to each other, it seems to me to be the duty of this Court rather to exert itself to overcome the difficulty, than to press it with undue severity. They stood to each other in the relation of guardian and ward, or *quasi* guardian and ward, and every reasonable intendment should be made for the benefit of the ward, in the construction of transactions or contracts between them, occurring soon after the termination of that relation.

Giving the proper weight to this consideration, and perhaps independently of it, there is, I think, in the record, sufficient evidence that a certain proportion of this debt is for the purchase-money of real estate. The deed to George R. Spalding, from Hamilton and wife, John F. Spalding and wife, and purporting also to have been executed by Basil D. Spalding, by which the interest of the grantors in the estate of George H. Spalding was conveyed to the grantee, was for the consideration of $5,000. The interest, therefore, of these grantors in

that estate was conveyed for that sum, and as Basil D. Spalding's interest was one-third, I see no insuperable objection to giving him the benefit of the vendor's lien for that proportion, say $1,666 66⅔.

The estate, when sold by the trustee, subject to the dower of the widow, brought $2,626 06, and upon the interest of Basil D. in the estate, I am of opinion he is entitled to be regarded as the holder of the vendor's equitable lien, and to be paid in preference to the general or judgment creditors of George R. Spalding. For the residue of his claim, he must share the fate of those creditors.

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ROBERT J. BRENT, for Complainant.
ALEXANDER, for Defendant.

AMOS A. WILLIAMS
vs.
THE SAVAGE MANUFACTURING COMPANY.
} MARCH TERM, 1851.

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[CHANCERY PRACTICE—AMENDMENT OF ANSWER—PRODUCTION OF BOOKS AND PAPERS—MERGER OF STOCK.]

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As a general rule, a special case must be shown before the Court will allow a defendant to amend his answer.

Amendments will be allowed where new matter has come to the knowledge of defendant since his answer was filed, or in case of surprise, or mistake, or where an addition has been made to the draft of the answer after the defendant has perused it, and in some other special cases.

This unwillingness of the Courts to permit a defendant to change, or add to the grounds of defence set up in the first answer, is increased when the application is made after the opinion of the Court and the testimony have indicated how it may be modified to accomplish his purpose.

An order granting the complainant the right to surcharge and falsify an account, was appealed from, and the Court of Appeals remanded the cause, under the Act of 1832, ch. 302, for the purpose of amending the pleadings and taking further testimony, and for further proceedings, and extended the right to surcharge and falsify to both parties, provided defendant, by

amendment of his pleadings, placed himself in such an attitude as to warrant such extension. HELD—

That under this decision the defendant could amend his answer, so as to surcharge and falsify in respect to matters known to him at the time of filing his original answer.

The power to compel the production of books and papers, clearly belongs to this Court, but should be exercised with caution, and the party invoking it must designate, with a reasonable degree of certainty, the books and papers required, and the facts expected to be proved by them.

The application for the production of books stated, "that if they had been kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issues in the cause." No particular books were designated, and no facts expected to be proved by them stated. HELD—

That it would be an inconvenient and unjustifiable expansion of the rule upon such an application as this, to order all the books of a corporation to be brought into Court.

It is competent to this Court, after an account has been stated by the Auditor, in pursuance of directions, to review and reverse the decision, and to dismiss the bill, on more mature consideration.

But where an order of this Court has been appealed from, and the Appellate Court has remanded the cause for further proceedings, without reversing or affirming such order, but in the order so remanding the cause has expressed its distinct approbation of the order appealed from, no question adjudicated by that order is open for examination in this Court, except those in regard to which additional evidence has been introduced.

As a general rule, the parties must be limited to the items of surcharge and falsification specified in the pleadings; this is indispensable, to prevent surprise.

Unless there is some provision in the charter to the contrary, a transfer of its own stock directly to a corporation, will operate as a merger of the stock so transferred.

But it does not follow that though the shares transferred to the corporation are merged for the time being, they may not be subsequently revived.

Where banks take their own stock in payment of, or in pledge to secure debts due them, it has always been the understanding and practice, that they were authorized to re-issue the stock whenever they thought fit to do so.

This Court has the power to order a re-transfer of stock, or the issuing of new shares, where justice between the parties require it, the amount of capital authorized by the charter not being exceeded by such issue.

If a deed is executed under suspicious circumstances, or is merely constructively fraudulent, this Court may, and should, permit it to stand as a security or indemnity to the grantee.

Equity, unlike a Court of law, which must pronounce one way or the other upon the validity of a deed, may adopt a milder course, and suffer it to stand, not as an absolute conveyance, but simply as a security for the sum really due.

In this case, a settlement between the complainant and the corporation was made, and stock of the Company transferred to the latter for the amount found to be due by the former. Upon a bill by complainant attacking this settlement it was decided, that it was not fraudulent in fact, and was allowed to stand, but leave was granted to surcharge and falsify the accounts upon which it was based, and they were accordingly corrected, and the amount due greatly reduced. HELD—

That the complainant has the right to demand the whole amount of stock transferred by him, upon his paying the amount really ascertained to be due from him, such transfer to stand merely as a security for the sum actually due.

[The first opinion of the Chancellor in this case, delivered on the 22d of November, 1848, is reported in 1st *Md. Ch. Decisions*, 306. The decree of the Chancellor accompanying the opinion was as follows:

"This case standing ready for hearing, and having been fully argued by the solicitors for the complainant and the defendant, the proceedings have been read and considered. And it appearing to the Chancellor, for the reasons stated, that the charge of fraud, in the settlement of the 1st of June, 1844, has not been sustained by the proof.

"It is thereupon adjudged and ordered, this 22d day of November, 1848, that the said settlement stand and be established. But it appearing further to the Chancellor, for the reasons also in that respect stated, that said settlement was founded upon accounts, which are erroneous in several particulars, both in the items of charge and credit; and that justice, and the principles which govern this Court, require that the complainant should have liberty to surcharge and falsify the same. It is thereupon further ordered, that the complainant have liberty so to surcharge and falsify said accounts in the particulars, and to the extent specified in the accompanying opinion of this Court. And this case is hereby referred to the Auditor, with directions to state and report the necessary accounts, from the pleadings and proofs now in the cause, and such further proofs as the parties may lay before him—the said accounts to conform in all respects to the principles, and to be confined within the limits prescribed in the said opinion of this Court."

Both parties appealed from this decree, and upon the hearing of the appeals, the Court of Appeals passed the following decree.

"These appeals, standing ready for hearing, were argued by the counsel for the parties. The proceedings have since been considered, and it appearing to this Court that the substantial merits of the cause will not be determined by the reversing or affirming of the decree of the Chancellor, and that the purposes of justice will be advanced by remanding the cause, it is thereupon, this 14th day of December, in the year 1850, by," &c., "adjudged and ordered, that the cause be remanded to the Court of Chancery, for the purpose of amending the pleadings, if deemed necessary by the parties, and that such further testimony be taken therein, and other proceedings had, under the Chancellor's direction, as shall be necessary for determining the cause upon its merits. This Court concurs with the Chancellor in the opinion and decision given by him, but inasmuch as his decision restricts the right to surcharge and falsify to the complainant alone, this Court modifies his opinion so far as to enlarge and extend that right to both parties, which it deems essential to the substantial merits of the cause, in the event of the defendant, by amendment of its pleadings, placing itself in such an attitude as will authorize the Chancellor to make such enlargement and extension."

After the cause was remanded to the Chancery Court under this decree, the defendant filed an amended answer, under an order of the Court of the 30th of March, 1851, granting leave therefor, pointing out and specifying at length various particulars in which the account upon which the settlement was based was erroneous. The complainant excepted to this answer, *first*, because it attempted to surcharge and falsify the account in many particulars, but does not aver and show that the matters, or any of them, therein charged, were recently discovered, or were not known to the defendant at the time of its filing its original answer, or at the original hearing of the cause. *Second*, because it attacks the credit in said account of $6,500, allowed complainant for salary from July, 1832, to

January, 1839, whereas his right to said credit has already been put in issue and decided by this Court and the Court of Appeals. *Third*, a similar objection to the attempt to impeach the credit of $1,033 33, for salary from 1st of January, 1839, to 6th of July, 1839. *Fourth*, a like objection to the attempt to impeach the credit of $1,128 96, for amount of dividend on complainant's stock. *Fifth*, because the answer seeks to impeach the right of the complainant to exclude from said account the charge of $1,350, for cash paid him by C. D. Williams, his right to do so having been already decided by this Court and the Court of Appeals. *Sixth*, a similar objection to the complainant's right to exclude the item of $5,402 55, alleged to be due on settlement of account with railroad. *Seventh*, because the answer insists that complainant is chargeable with all the money, materials, and labor expended and supplied for the construction of the furnaces, wheel and pattern house, cupola, bellows, gearing, coal house, &c., all which matters have already been adjudicated by this Court and the Court of Appeals. And as an additional exception, *eighth*, because the answer attempts to surcharge and falsify the account in many particulars, but hath not averred or charged that the matters, or any of them, were recently discovered, or were not known to defendant at the time of the settlement of June, 1844, which it is the object of this suit to avoid. At the hearing of these exceptions, on the 10th of May, 1851, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

There can be no doubt that a special case must in general be shown before the Court will allow a defendant to amend his answer, and this for reasons too obvious to be stated. Amendments have been allowed where new matter has come to the knowledge of the defendant since his answer was filed, or in case of surprise or mistake, or where an addition has been made to the draft of the answer after the defendant has perused it, and in some other special cases, treated of in the books of practice, and in reported cases, 2 *Danl.'s Ch. Pr.*, 911, 912.

And this unwillingness on the part of the Courts to permit a defendant to change, or add to, the grounds of defence set up in the first answer, is certainly not diminished when the application is made after the opinion of the Court and the testimony have indicated how it may be modified to accomplish his purpose. *Calloway* vs. *Dobson*, 1 *Brock*, 119. Had the application, therefore, in this case been made to this Court after its judgment was pronounced upon the proofs and pleadings before it, at that time, and prior to the order of the Court of Appeals remanding the cause for further proceedings, it seems to me to be quite clear, that, according to the well-established practice of the Court, it would have been rejected, and consequently the first and the additional exception filed by the complainant to the amended answer in this case would have been sustained, as, in the order of the 3d of March last, giving leave to file an amended answer, in conformity with the order of the Court of Appeals, it was intended that the privilege should go no further than that order allowed, and that the amended answer, when filed, should be subject to exceptions if it transcended it.

In the opinion and order of this Court, of the 22d of November, 1848, the cause was referred to the Auditor, with directions to state an account, in conformity with the principles which, in my judgment, in the then condition of the cause, should govern it; and the complainant was given liberty to surcharge and falsify the settlement of the 1st of June, 1844, in several particulars specified in the opinion; but inasmuch as the defendant, standing upon that settlement as a compromise of conflicting claims, did not seek to surcharge and falsify, the order of this Court necessarily limited the right to the complainant, so that every error in the accounts upon which the settlement was made injurious to the defendant (if any such there be), could not be examined into or corrected. In this state of the cause an appeal was taken by the defendant to the Court of Appeals, which, at its December term last, passed an order remanding the record to this Court, under the provisions of the 6th section of the Act of 1832, ch. 302, without reversing or

affirming the order appealed from, upon the ground that the substantial merits of the cause would not thereby be determined, and that the purposes of justice rendered such course necessary; and the Court likewise in that respect exerting the authority conferred upon it by the Legislature, declared that it remanded the cause for the purpose of amending the pleadings, if deemed necessary by the parties, and that such further testimony be taken therein, and other proceedings had, under the Chancellor's direction, as should be necessary for determining the cause upon its merits.

The Court of Appeals further said in their order, that they concurred with the Chancellor in the opinion and decision given by him, but forasmuch as his decision restricted the right to surcharge and falsify to the complainant alone, they modified his opinion so far as to extend the right to both parties, which was deemed essential to the substantial justice of the case, in the event of the defendant, by amendment of its pleadings, placing itself in such an attitude as will authorize the Chancellor to make such enlargement and extension.

The Court of Appeals, then, in the exercise of the discretion conferred upon them by the Legislature, have thought fit to remand this cause to this Court, and in explicit terms have authorized the parties to amend the pleadings, if deemed necessary by them, and to take further testimony; and they have also made the right to surcharge and falsify reciprocal, deeming such course essential to the substantial merits of the cause, provided the defendant, by amendment, put itself in a condition to authorize the Chancellor to give that privilege to it.

The Court of Appeals have not said, nor upon any just construction of their order can they be understood to mean, that the defendant may amend its answer so as to place itself in a condition to surcharge and falsify the accounts, provided it shall be shown to the Chancellor that the matters, in respect of which it seeks so to surcharge and falsify, were recently discovered, or were not known to the defendant at the time of filing the original answer, or at the original hearing of the cause in this Court. On the contrary, it is most manifest from

the whole record, that the Appellate Court passed its order irrespective of any such consideration. It was from the record before them that they came to the conclusion that justice required that the privilege of impeaching the settlement should be mutual, and there was and could have been no pretence for saying that the facts contained in the record, upon which the Court of Appeals acted, were not known to the defendant when the original answer was filed, or when the cause was first heard in this Court. My opinion, therefore, is, that the exception on this ground cannot be supported.

The other exceptions maintain, that many of the particulars in respect of which the defendant proposes to surcharge and falsify the settlement were conclusively adjudicated by the former order of this Court, and as the Court of Appeals concurred in that order, and the reasons upon which it was passed, nothing settled by it is now open.

I have carefully read over the answer, and compared it with the former opinion and decision of this Court, and do not find it obnoxious to this objection. It does not propose to relitigate what has been already adjudged, though it does propose, in some instances, by counter charges, to show that sums which were allowed the complainant have been paid. It would be tedious, and indeed, pressed as I am at this time, it would be impossible to go in detail over the various points adjudicated by the Court, by the order of November, 1848, and specify particularly why I think the amended answer does not propose to retry or controvert them. But one or two points will be adverted to as examples.

The first error adjudged to exist in the account, was that the complainant was entitled to be credited with dividends upon the whole capital invested in the Savage Railroad Company, and this the defendant does not, and cannot now be allowed to dispute.

Second, that it was erroneous to charge the complainant with ten per cent. on the cash balances in this account; and this, therefore, is no longer open to, nor does the amended answer propose to call it in question. Third, that the sum of

$1,350 was charged twice, when from the proof then before me, I was of opinion it should not have been charged at all. Now the judgment of the Court, in reference to this item, the answer does not controvert, that is, it does not deny that as the account then stood, it was twice debited to the complainant, when he was not liable at all. But the opinion of the Court was expressly founded upon the case as it then stood, and the proof then in the record; and as leave was given, in the order referring the case to the Auditor, to take further proof, it would have been competent to the defendant to have offered further proof in support of this item of charge. The opinion of the Court did not preclude either party from producing additional evidence in regard to this item, and as the complainant was not debarred from the right to offer evidence in support of his claim, to have stricken from the account the sum of $2,353 33, alleged to have been paid by him to Mr. Herbert, for land purchased from the latter, because he had not *then* satisfied the Court that the charge was erroneous, so neither should the defendant be denied the right to introduce evidence in support of a charge, which the evidence he had then produced did not establish. The Court, with regard to the item of $1,350, had decided against the defendant, "upon the proof then before it." And with regard to the sum of $2,353 33, the decision was against the plaintiff, because "he had not succeeded in satisfying the Court that the charge was erroneous."

Now surely if the complainant, notwithstanding this decision against him at that time, is at liberty to bring forward further proof in support of this charge, and his right to do so cannot be disputed, with what propriety can it be said the defendant shall not be equally favored with reference to the first-named sum, because the decision with regard to it was adverse to him upon the proof then in the record?

With regard to the charge against the complainant, for moneys expended in erecting the furnace, the answer does not propose to open the question anew, the judgment of the Court

upon that subject is therefore considered as final. These examples are deemed sufficient.

That this cause has not progressed as speedily as the complainant may desire, and that further delays may be encountered before it is brought to a final conclusion, may be a subject of regret. But sitting here to administer the law according to my best judgment, I cannot permit these considerations to operate so as to take from the defendant rights and privileges which the Legislature, in its wisdom, and the Court of Appeals, in expounding the will of the Legislature, have secured to him. An order will be passed, overruling the exceptions.

[After the amended answer was filed, and the case was about to be sent to the Auditor for an account and further proof, an order was passed, on the 6th of September, 1851, by consent of parties, that defendant should bring into Court all its books of accounts, other than those of recent transactions, which are understood to be those opened or commenced on or about the year 1842, and that complainant have leave to inspect said excepted books at the counting-house of the town agent, at all reasonable times, and reserving liberty to him to apply for further orders in respect of said excepted books, if he shall be deterred or impeded in the exercise of his privilege of such examination, or if from other causes, such application shall be deemed necessary by him. The books so ordered to be brought in, are all the books kept either in town or at the factory.

Under this order, the books prior to 1842 were brought into Court, and on the 29th of January, 1852, the complainant filed a petition, stating that he had been permitted from time to time to examine the excepted books kept by the town agent, but in so doing, he has been subjected to many and great annoyances, which tend much to thwart his purposes, and to delay this cause, and that he has been prevented from making any examination whatever into the books kept at the factory, although it was well understood at the date of said order, that he proposed to examine them, and that they would be brought to the office of the town agent, or some facility tendered him

for examining them at the factory. And though the agents of defendant had several times promised that said books should be laid before him, they had delayed to fulfil the same, and now require him to indicate the entries which he would examine, and the purposes to which he would apply his examination when made. That he has been so effectually excluded from the exercise of his ordinary rights as a stockholder, that he is unable to designate the books which it is necessary for him to inspect. He can only say, that if kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issues in this cause, and his confidence that they do contain such evidence is increased by the anxiety evinced by the agents of defendant to exclude him from an examination thereof. That he does not believe that any inconvenience can result to defendant by the production of these books for the purpose of such examination, and he therefore prays that defendant be required forthwith to bring into Court all said excepted books, both those kept at the factory and by the town agent, also the book or books containing a list or an account of the bills and notes issued by or for said Company, and also the book or record of the proceedings of the Company.

Upon this petition, the Chancellor, on the same day (29th of January, 1852), passed an order, setting it down for hearing upon notice to defendant; and upon the hearing thereof, on the 17th of February, 1852, delivered the following opinion.]

THE CHANCELLOR:

The present application, which is brought before the Court upon the order of the 29th of January last, and upon which counsel have been heard, is not to enforce obedience to the order of the 6th of September, 1851, passed by consent of parties, and, therefore, I am not called upon to pronounce an opinion upon the scope and true intent and meaning of the last-mentioned order. It is understood, that the books of account, prior to the year, 1842, which alone were directed to be brought into Court, have been so brought in; and the application now is, that those opened or commenced since that

period, shall likewise be brought in, upon the ground, as stated in the petition filed on the 29th of January last, that the complainant, "though he has been permitted, from time to time, to examine those books, has been subjected to many annoyances which tend much to thwart his purposes and delay the cause;" and that with respect to the books, kept at the factory, he has been prevented from making any examination whatever.

The order of September last, reserves to the complainant liberty to apply for further orders, in respect of the books opened since 1842, if he shall be deterred or impeded in the exercise of his privilege of examination, or if from other causes such application shall be deemed necessary by him. And in virtue of the liberty so reserved, the present application is made. The defendant resists it upon several grounds, and among others, upon the ground that the complainant "has not specified in his petition, the books and papers he wants; nor the evidence that he expects to prove by them."

The petition of the complainant, after complaining that owing to his exclusion from the rights which pertain to him as a stockholder, he is unable to designate the books which it is necessary for him to inspect, states, "He can only say, that if kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issue in this cause." And this makes it necessary to inquire, whether under the law and practice of this Court, in reference to this subject, a sufficient foundation has been laid for an order to compel the defendant to bring in the books?

I do not deem it necessary to enter into an examination of the complainant's right, as a corporator, to inspect the books of the corporation; nor into the rights of partners, with regard to the partnership books, because the complainant and defendant are not partners; nor is he here in his capacity as a corporator, asking for a discovery of the general transactions of the corporation. This suit is brought for no such purpose, its object being to set aside a particular settlement made between the parties, and for leave to surcharge and falsify the accounts

upon which it was made; and by the judgment and order of this Court, approved by the Court of Appeals, the complainant has had permission to surcharge and falsify with respect to certain errors specified in his bill, and with respect to them alone. The complainant, therefore, stands before the Court precisely in the attitude of an ordinary suitor, and upon this application to compel the production of books and papers from the adversary, must show himself entitled upon the general practice and law regulating the subject.

In the case of *Williams and Bradford* vs. *Williams*, 1 *Md. Ch. Decisions*, 199, it was observed, that the power to compel parties to produce books and papers, though clearly belonging to the Court, was a power to be exercised with caution; and that the party invoking it "should, with a reasonable degree of certainty, designate the books and papers required, and the facts expected to be proved by them." And the cases referred to in the notes to 1 *Bland*, 90, and that of *Duvall* vs. *The Farmers' Bank*, 2 *Bland*, 686, were referred to, as showing this to be the rule.

Assuming this to be so, it appears to me, that the petition in this case is insufficient as the foundation of the order prayed. It not only does not designate the books called for, nor the facts expected to be proved by them; but the allegation, general as it is, that they contain evidence pertinent to the issue, is stated hypothetically, the allegation being "that if they have been kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issues in the cause." But, as was said by Chancellor Hanson as far back as 1803, "in all cases, where books have been ordered to be produced, the particular books have been specified, and the Court has been first satisfied of the necessity of producing them." 1 *Bland*, 90. It appears to me, therefore, that it would be a most inconvenient and unjustifiable expansion of the rule, to apply it to a case like the present, and merely upon the suggestion, that possibly they may contain evidence material to the issue to order the books of a corporation to be brought into Court.

It is, therefore, ordered that the application be overruled, and that the petition of the complainant, filed on the 29th day of January, 1852, be, and the same is hereby dismissed, with costs to be taxed by the Register.

[Further proceedings were then had in the cause, and accounts were stated by the Auditor, to which exceptions were filed; at the hearing of which, the Chancellor, on the 22d of October, 1852, delivered the following opinion, wherein the nature of the exceptions and the facts of the case are fully stated.]

THE CHANCELLOR:

In the opinion of this Court, delivered on the 22d of November, 1848, and by the order of that date, several of the errors specified in the bill, and constituting the grounds of surcharge and falsification relied upon by the complainant, were adjudicated in his favor; and the opinion and judgment of this Court with respect to these errors, having been approved by the Court of Appeals, they must be regarded as settled, unless the proof taken since that order, should be considered sufficiently strong to warrant different conclusions.

The language of the Court of Appeals, in their order passed at December Term, 1850, is, that they "concur in the opinion and decision of the Chancellor;" but as his decision restricted the right to surcharge and falsify the account to the complainant alone, they modified his opinion so as to make the right to surcharge and falsify reciprocal, as essential to the substantial merits of the case, and leave was given to amend the proceedings accordingly.

The defendant has availed himself of this privilege, and much additional proof has been taken, bearing more or less upon some of the questions formerly decided, leaving others of them to rest upon the record, as it stood at the time that decision was made.

It was supposed, by the defendant's counsel, that the case of *Snowden* vs. *Dorsey*, 6 *H. & J.*, 114, and the numerous cases

affirming the principle, that it is competent to this Court, after an account has been stated by the Auditor, in pursuance of directions, to review and reverse the decision and to dismiss the bill on more mature consideration, justified a re-examination of every point settled by the order of November, 1848, and accordingly, almost every question has been re-argued. But, inasmuch as the Court of Appeals has expressed its distinct approbation of that order, this Court, should it now proceed to a reconsideration and reversal of it, would not be simply reconsidering and reversing its own judgment, but that of the Court of Appeals, a liberty which it is supposed this Court can hardly be warranted in taking. I therefore conclude, that no question, adjudicated by the order referred to, is open for examination, except those in regard to which additional evidence has been introduced.

And with these remarks, I proceed, as briefly as possible, but after a very careful examination of all the proceedings and evidence in the cause, had or brought in subsequently to the order of November, 1848, to express my opinion upon the questions, which, in my judgment, now remain to be decided; and, in doing this, I shall first take up the grounds of surcharge and falsification stated in the bill, and then those specified in the amended answer.

The first error alleged in the bill, in the account J. J., is the charge of $150 cash, advanced to the complainant, to pay his travelling expenses to Boston. This was alleged to be too much by fifty dollars, but it is now admitted that the charge is correct, and it must stand.

The second error has relation to the Railroad account. I have already expressed the opinion, that the complainant is entitled to be credited with the whole of whatever sum may be regarded as a proper compensation for the use of the Savage Railroad, and, as ten per cent. was the rate of compensation allowed in the account No. 2, stated by C. D. Williams, that rate was allowed on the whole cost of the road. The decision, that complainant is to be regarded as the sole proprietor of the road, and entitled to be credited with whatever may be

considered proper to be paid for its use by the Savage Company, must stand unchanged. But, upon the subject of compensation, proof has been introduced, since the former argument, which, in my judgment, must affect the rate to be paid by the defendant for the use of the road. In the first place, there does not appear to have been any contract between the parties in relation to it. And in the next, it is shown, that the motive power and every expense attending the transportation upon the road, was paid and furnished by the defendant. Under these circumstances, I do not think it would be proper to allow ten per cent. upon the cost of the road for its use, and the point of difficulty is, what will be a fair rate? The best guide, I think, is the letter of Mr. George Williams, agent of the cotton factory, to L. Jarvis, President of the said Railroad Company, under date of the 1st of April, 1841. In that letter, he proposes, on the part of the cotton factory, to pay for that year, six per cent. on the cost of the road, and $100 in addition for repairs. Now, in the absence of any contract for the residue of the period, during which the road was used by the defendant, I am persuaded no injustice will be done by adopting the terms of this letter, and applying them to the whole period, and that, therefore, is my judgment. With regard to the time when the road was first opened, and the use of it by the defendant commenced, I conclude, from the proof, that it was on the 1st of June, 1836, and without undertaking to decide upon the conflicting proof, as to the period of time down to which its use continued, my opinion is that, under the pleadings it must stop with the 1st of July, 1843. In stating the account, interest at the rate of six per cent. should be allowed the defendant, on the cash advanced by it for the construction of the road, from the time of each advance respectively, and the annual sum to be paid by the defendant for its use, should be taken to be payable in equal semi-annual payments, and credited with interest accordingly, but no rests on either side should be allowed.

The next item of surcharge stated in the bill is the sum of $1,350, as for cash paid complainant by C. D. Williams, that

sum having been deposited with him by the Company. It was stated in the opinion first delivered by this Court, that this sum had been twice charged to the complainant, and this is now conceded by the defendant, and of course to that extent the account J. J. must be corrected. But the opinion of November, 1848, declared further, that there should have been no charge at all against the complainant in respect of this sum. And that now may be considered a question proper for further consideration, additional proof bearing upon it having been brought in since that opinion was made. This item of $1,350 is referred to in the 13th paragraph of the amended answer, where it is alleged that this sum, on the 18th of December, 1835, was withdrawn by the complainant from the funds of the defendant, received by him or under his control, and applied professedly to the payment of an alleged claim of a manufacturing company in Boston, on account of patent rights, and the answer insists that the said sum is a just and proper debit against the complainant. It appears by the receipt of C. D. Williams, dated the 19th of September, 1828, that this sum of $1,350 was placed in his hands, as a stakeholder, by Dean Walker, who, together with the defendant, had been carrying on a machine establishment, to answer for a claim set up by the agent of one Patrick T. Jackson, on account of certain patent rights. The complainant was that agent, and, on the 18th of December, 1835, as appears by an entry in the day-book of the defendant of that date, he being at that time the agent of the defendant, and at their factory, the sum in question was paid him as agent of Jackson by himself as the agent of the defendant. The money then was paid by the complainant to himself as the agent of Patrick T. Jackson, who was the agent and treasurer of the Boston company, to whom the patent right belonged. The complainant received the money in the capacity of agent, and in none other had he any color of right to it. But it now appears by the deposition of Eben Hobbs, taken under a commission sent to Boston, that the witness has been superintendent and agent of the Boston Company for thirty-two years, and that no money was

ever paid to the latter Company by the complainant for patent rights, and that in fact the Boston Company had ceased to insist upon their patent rights from about the year 1825, and that they set up no claim whatever against the defendant. It is, therefore, quite clear, that if the complainant is permitted to retain this money, he will retain it without consideration, and without accountability to any one. That it does not *ex æquo et bono* belong to him is too apparent for dispute, and as the defendant has paid Dean Walker his half of the money, as is shown by his receipt of the 13th of March, 1845, the equity of defendant to call back the whole sum from the complainant, cannot, in my judgment, be resisted. This receipt, it is true, was in the record when the order of November, 1848, was passed, but the deposition of Mr. Hobbs was not, and it was thought that the mere act of paying Walker, without the concurrence of the complainant, could not render him liable to refund the money, to which, as agent of Jackson, he was or appeared to be entitled. I do not think that the report made by Mr. George Williams, to the proprietors of the Savage Manufacturing Company, under date the 15th of February, 1836, in which he speaks of this sum of money having been paid over to the agent by C. D. Williams, the stakeholder, in reduction of the liabilities of the Company, sufficient to countervail the positive proof that the party supposed to be entitled has not received and does not claim the money. That report was made only two months after the money was received by the complainant, and when, no doubt, it was supposed his principal was entitled to and claimed it. I do not propose to consider and decide the question of practice raised by the petition filed by the complainant on the 21st instant, and after the argument had commenced, placing my judgment upon the broad, and, as I think, impregnable ground, that upon principles of justice the complainant is bound to refund this money.

The next succeeding ground of complaint against the account specified in the bill is directed against the charge of $2,353 33, as paid in purchase of land from Herbert and Worthington.

The complainant first avers that of this sum $590 was advanced and paid out of his own proper moneys, and, secondly, that the lands were purchased by him as agent of the defendant, and with its concurrence and approval. Upon the former argument I was of opinion, and so said, that the complainant had not succeeded in satisfying me that the charge in question was erroneous, and reasons were given, the sufficiency of which appears to me to be unshaken, why the complainant should not be permitted at all events to strike the whole item from the account. There can be no doubt that the defendant, by its charter, could not have purchased and held these lands, and that, upon a proper proceeding, the Company would have been divested of its title. The presumption is therefore strong, that the use of the corporate funds in the purchase was unauthorized, and the assent of the stockholders thus to employ them, if obtained at all, was not obtained in the regular way, and conferred no power upon the complainant as agent to make the purchase. The lands, in point of fact, have not been conveyed to the corporation, the parcel bought of Worthington having been conveyed to the complainant himself, and that purchased of Mr. Herbert having been conveyed to Mr. Lansdale. The sole question, therefore, upon the bill is, whether the complainant shall be charged with the whole sum of $2,353 33, or whether from that sum is to be deducted the $590 which he alleges was paid out of his own moneys? I have read the statement made by Mr. Latrobe before the Auditor, and examined the pass-book of the complainant with the Mechanics' Bank of Baltimore. Mr. Latrobe proves that in February, 1839, the trustees of Joseph Thornburgh's estate loaned the complainant the net sum of $1,378 07, and by an entry in the book under date the 21st of March, 1839, and by a copy of a check found in the printed record, dated on the same day, the complainant appears to have paid Worthington $1,300. This check, Mr. Worthington proves at page 76 of the printed record, was given to him for the first payment to be made on the land. In view of these facts, I am of opinion that the complainant did apply a portion at least of the money he borrowed from Thornburgh's

trustees to the payment of this land. In his bill he has limited his claim on this account to the sum of $590, and to that amount he must be confined, but, in my judgment, this sum of $590 must be deducted from the amount charged against him in the account J J, and that the balance only of said sum shall stand as a charge against him.

In the former opinion it was said, that the complainant's salary could not be credited later than the 6th of July, 1839, and that it could not be allowed to exceed the sum of $1,000 a year, and in that respect no change is proposed now, or can be made.

Passing then from the items of surcharge and falsification specified in the bill, those insisted on in the amended answer remain to be considered.

1st. The first is, that of the $6,500 credited for salary in J J, from the 1st of July, 1832, to 1st of January, 1839, the sum of $3,500 being the whole amount due up to the 1st of January, 1836, was paid to the complainant by himself, acting in that behalf as agent of the defendant, and this is admitted by the complainant to be true. Of course the account in this respect is erroneous, and must be corrected.

2d. The second item of surcharge, which relates to the complainant's salary for the last six months, has already been disposed of.

3d. The third item of surcharge has reference to the credit of $1,128 96, for dividend on the defendant's stock, declared the 1st of October, 1839, which the amended answer alleges was paid, without, however, undertaking to say when or in what mode it was paid. I am not satisfied of the fact of the payment, and therefore this allegation of error in the account is not maintained.

4th. The fourth item is a mere allegation of general error in the account, as the result of omissions and errors, and need not be particularly noticed.

5th to 12th. The items from five to twelve, inclusive, relate to the interest which the answer alleges should be charged against the complainant on the several sums specified therein.

The account J J, was made up without charging interest on either side. In the course of the transactions upon which the account is founded, the balance may have shifted from time to time; and in view of all the circumstances, and in the absence of any fixed rule of law giving interest as a matter of right, I am of opinion the claim cannot be supported, and it must be disallowed.

13th. The thirteenth ground of surcharge relied upon in the answer, has already been noticed and disposed of.

14th. This item of surcharge, which applies to the railroad account, has likewise been examined and disposed of in considering the second error specified in the bill, and nothing further need be said regarding it.

15th. This allegation in the amended answer, which charges the complainant with the receipt of moneys prior to the settlement of this account J J, for which it was said he had not in any manner accounted, is understood to be abandoned. The moneys thus alleged to have been received, and not accounted for by the complainant, are stated and enumerated in a paper marked Exhibit A A, No. 3, filed with the amended answer; but, as appears by the report of the Auditor, this paper was sent to the defendant's solicitor for proof, and has not been returned, and no proof whatever has been offered in support of it. This item of surcharge, therefore, must be disregarded and rejected.

16th. The sixteenth item of surcharge in the amended answer has respect to certain orders, drawn by the complainant, which the defendant alleges were paid out of moneys or other means of the defendant, appertaining to defendant's store, and for which orders the complainant received credit, as if the sums for which they were drawn were paid by himself, but for which he gave no credit to the defendant. These orders, which are stated in the defendant's Exhibit A A, No. 4, amount in the aggregate to $5,624 32, commencing in the year 1836, and terminating in May, 1839. In examining this item it is very material to consider (indeed the fact bears with irresistible force upon the question), that it has not been shown, nor has

any attempt been made to show, that the complainant ever received a dollar of the money of the defendants with which he did not charge himself. It appears from the evidence of John J. Tenain, taken before the Auditor, that the complainant, while acting as agent for the defendant, was in the habit, from time to time, of depositing cash at the store, and that it was likewise his habit to pay those having claims against the defendant by orders drawn by him upon the store, the moneys deposited being mingled with the proper funds of the store, and paid out indiscriminately with the money of the store, upon the complainant's orders. And further, that the moneys thus deposited by the complainant in the store, were not on any of the books kept for its regular business. And the evidence of Thomas C. Miller, in the printed record, pages 218 and 219, shows why it was that there was confusion in the cash accounts. The books certainly appear to me not to have been kept with as much accuracy as they should have been. Balances have been forced, and entries made in the profit and loss account which it is not easy to explain; but seeing that if the complainant is made to account for the amount of these orders as cash, that the defendant will get credit for more cash than it ever received from all sources, I cannot agree in the propriety of making the complainant so account.

These observations apply also to the eighteenth and nineteenth items of surcharge in the amended answer, and show that they cannot be maintained.

In coming to the conclusion that the complainant is not properly chargeable with the items of claim specified in the 16th, 18th, and 19th paragraphs of the amended answer, the letters of C. D. Williams to George Williams, dated in August and September, 1839, are certainly entitled to considerable weight. The complainant resigned his agency for the defendant on the 6th of July of that year, and was succeeded by the writer of these letters, and it must be presumed they were written after an examination of the accounts. It will be seen upon reading them, that no such claims as are now preferred against the complainant were then made. In that of the 21st of August, 1839,

the debts of the railroad, and the land he purchased some years before, were said to comprise the whole claim against him, or nearly so, whilst in that of the 10th of September following, his store account for the expense of his house, and the railroad account, it was said, would perhaps show everything. Now it is surely reasonable to suppose that if these large sums were due from the complainant, and ascertained to be so due from an inspection of the books, then in possession and subject to the examination of C. D. Williams, that they would have been claimed.

17th. In this item the defendant claims to recover from the complainant the sum of $808, paid to Hugh McEldery, on the 6th of July, 1840, as damages on a contract for lumber to be furnished by him to the defendant, for the erection of an additional cotton mill, upon a contract made with him by the complainant, acting in that behalf for and on account of the defendant, but without any authority for that purpose from the defendant, as the answer alleges. It appears by the deposition of Mr. McEldery, that the contract for this lumber was made in February, 1839, by the complainant with the witness, and that this contract, after the lumber was ready for delivery, was cancelled, at the urgent solicitation of George Williams, the town agent of the defendant, in consideration of the payment to the witness of the sum in question, which was in fact paid on the 6th of July, 1840. The complainant does not appear to have been consulted in regard to this compromise with Mr. McEldery. In fact, before the note was given for the payment of the amount agreed upon, the complainant had fallen into a condition of mental imbecility, and had ceased to be the agent of the defendant, the note being signed by his successor, Mr. C. D. Williams. The Auditor reports that it would seem the complainant was not justified in entering into this contract, and that he is properly chargeable with the sum paid. It is unquestionably a circumstance against the propriety of now charging the complainant with this money, that it does not appear, at the time of its payment, to have occurred to C. D.

Williams, the agent of the factory, or to Mr. George Williams, the town agent, that the complainant was so chargeable.

Mr. George Williams, according to the proof of McEldery, did not, when informed by the latter that the timber was nearly ready for delivery, question the obligation of the defendant to comply with the contract, by receiving and paying for it. On the contrary, he applied to the witness to release the defendant from the contract, and it was only on his urgent solicitation that the former consented to do so. And the agent at the factory, recognising the right of the town agent to make the compromise, gave his note, as agent, for the amount agreed upon, which note was duly paid out of the funds of the Company. Now, it appears to me, that if the contract between the complainant and McEldery for the lumber, could be considered as binding on the Company, as falling within the general scope of his authority as agent (as is assumed in the amended answer), it may with equal propriety be assumed, from the acts of the town and country agents subsequently, in settling the claim and paying the money, without the suggestion of a doubt regarding the authority of the complainant to make the contract, that he was authorized to make it. And especially may such authority be assumed, when we find, that only very recently has the claim to charge the complainant with the money so paid, been brought forward. But conceding, that the complainant, in making this contract with McEldery, though acting within the general sphere of his authority, was guilty of an abuse of power, which would have rendered him responsible for the damage resulting from it, how can it be maintained, that the defendant shall, by a compromise, made in the complainant's absence, and without his knowledge or concurrence, fix the amount of his liability? For these reasons, I think this ground of claim against the complainant must be rejected.

20th. This item of surcharge in the amended answer having been withdrawn, need not be noticed.

21st. In this paragraph of the answer, the defendant surcharges the account, by insisting that the complainant is

justly chargeable with the sum of $500, with interest thereon, from the 16th of August, 1839, paid to the Farmers' Bank of Maryland, in satisfaction of the note given to meet the subscription to stock in the Annapolis and Elk Ridge Railroad Company, and the propriety of so charging the complainant is not understood to be disputed, though it is urged, that the defendant, by the form in which he has presented the claim in his answer, has precluded himself from insisting on it. Having read this part of the answer with much care, the complainant's construction of it does not appear to be the true one. It appears to me, that the answer, in effect, charges the complainant with having obtained a double credit for the said sum of $500 in his cash account, whilst he charges himself but once with that sum, though he received it twice; first, upon the note discounted at the Bank, and secondly, upon Heigham's order on the Railroad Company. The Auditor reports, that the complainant is properly chargeable with this sum, and in this conclusion I concur.

22d. In this paragraph of the amended answer, the defendant insists, that complainant should be charged with various sums of money, paid away and expended by him, in connexion with the proposed establishment of a Bank, and for tavern bills, travelling expenses, and for newspapers, &c., not at all connected with the business of the Company, and for which the Company was in no wise bound or liable. And the answer exhibits two papers, marked A A, No. 5 and A A, No. 6, showing the amounts and dates of the sums so expended. And this part of the answer, furthermore, insists, that complainant is justly chargeable for house-rent, and for some other small matters, not particularly enumerated. The Auditor reports, that no evidence has been offered to show that the Company ever authorized any action in reference to the establishment of a Bank, and I have been unable to discover any; I am, therefore, of opinion, that the complainant should be charged with such sums of the funds of the defendant as he expended in the steps taken by him to establish the Bank, but I do not think he is chargeable with travelling expenses, news-

papers, &c., unless it appears, that those travelling expenses were incurred on account of the Bank. In the Exhibit A A, No. 6, several sums appear to have been paid away by the complainant, on account of the Railroad, and with these, I think he is chargeable, as, for the purposes of this case, the complainant and the Railroad are one. For the reasons, however, already stated, I do not think the complainant should be charged with interest on those sums. The defendant has abandoned the claim on account of complainant's house, and I do not think the claim for house-rent can be maintained. In regard to this matter of rent, no want of authority can be urged, nor was a formal order of the corporation necessary, and the claim is now for the first time presented, though as far back as December, 1835, the complainant made the entry in his day-book, which is relied upon as furnishing grounds for the claim. After this long acquiescence, it seems to me too late to make the charge.

23d. Under this division of the amended answer, the attempt is renewed to charge the complainant with the sums expended in erecting the furnace and its appendages, and the charge has been pressed in the argument with much earnestness and force. As the case was presented by the record, upon the former hearing, it was not only the judgment of this Court, but that of the Court of Appeals also, that the complainant was not so chargeable, and, therefore, in the absence of new proof, it cannot, according to the views already expressed, be regarded as an open question. But an additional deposition has been taken, that of Mr. Henry H. Williams, and this deposition, it is supposed, in connexion with the proof formerly in this cause, is sufficient to induce the Court to change the judgment heretofore expressed. I do not, however, think so. Much of the same description of evidence was before the Court when the order of November, 1848, was passed. No doubt was then entertained, or is now entertained, of the veracity of the witnesses who deposed upon this subject, or of the truth of the facts to which they respectively deposed. The evidence now derived from Mr. Williams can, then, only be regarded as

cumulative, and cannot have the effect to overcome the mass of proof upon which the judgment of the Court was founded, and upon which it came to the conclusion, that the expenditure on account of the furnace was to be regarded for all substantial purposes as a Company expenditure, and the furnace itself as Company property. The judgment and order of the Court, therefore, upon this point, remain unchanged.

24th. No new evidence has been taken in regard to what would be a proper allowance to the complainant for entertaining the proprietors and others at the factory, and hence the former decision of this Court upon that subject must stand.

25th. It has already been said that the complainant is justly chargeable with the sum of $2,353 33, stated in account J J, as having been paid to Herbert and Worthington for land, after deducting therefrom the sum of $590, claimed in the bill to have been paid out of the complainant's own moneys. Upon this subject, the Auditor reports that it would seem that the defendant received from the land 327½ cords of wood, after the purchase by Lansdale (being of Herbert's land), and he submits whether the complainant should not be credited with the value thereof, to be determined hereafter. And with regard to the land purchased from Worthington, the Auditor says it is in proof that on two several occasions rent was received for it and paid into the store, though it is denied that any agent of the Company was authorized to receive such rent, or to treat the land as the property of the defendant. It has been urged, as it seemed to me at the time, with great force, that as no claim on account of this wood, or for those rents, was asserted in the bill, that the complainant could not be credited in respect of either, but upon reflection, I have come to a different conclusion. The aim of the bill was to get rid entirely of this charge, upon the ground that the lands were purchased by the complainant as agent for the Company, with the concurrence and under the direction of stockholders owning more than a major part of the stock, and therefore no complaint was made, or could consistently be made, with respect to wood or rents taken and received by the defendant, from and for the use of

the lands. But the judgment of the Court being against the complainant on this point, and it being determined that the purchase was not made for the Company, and that the complainant is chargeable with the money of the Company, applied by him towards paying for the lands, and the question being with what amount he should be so charged, justice seems to require that he shall be credited with any sums which the Company may have received from the same lands. The right to the deduction on this account is presented defensively, and not by way of surcharge or falsification of the account, and it therefore appears to me that the complainant is entitled to set off against the charge, with respect to these lands, the value of the wood taken by the defendant, from them, and the rents which it may have received from the tenants.

That there is a great deal of complication and difficulty in this case, it is impossible to deny, and though the conclusions I have formed upon the various questions involved in it are the result of a very careful consideration, aided, as I have been, by full and able arguments, I am quite sensible of the probability that I may, upon many of them, have fallen into error. Should this be so, the steps necessary for their correction will doubtless be taken by the aggrieved party.

The case will be sent to the Auditor, with directions to restate the accounts upon the principles, and according to the views hereinbefore expressed, and when this report comes in, the extent and character of the decree will be determined, due regard being had to the orders already passed in the cause.

[An order was passed accordingly, dated the 30th of October, 1852, and the Auditor having stated accounts in accordance therewith, exceptions were again filed thereto, at the hearing of which the Chancellor delivered the following opinion, on the 27th of January, 1853.]

THE CHANCELLOR:

This cause, standing ready for hearing upon exceptions to the report of the Auditor of the 12th of November last, and

being submitted, the counsel of the parties have been heard, and the proceedings read and considered.

That report, and the accounts accompanying it, purports to have been made in pursuance of the order of the 30th of October preceding, and as, in my opinion, it does conform therewith, and is supported by the evidence, it follows that the exceptions on both sides must be overruled, and the report confirmed.

The first exception of the complainant is to the charge against him of $500, in the account F, with interest thereon from the 16th of August, 1849, which in the exception is spoken of as a supposed payment in relation to Heigham. It is not deemed necessary again to go over and restate the grounds upon which, in the former opinion of this Court, the propriety of the charge in question is vindicated. The argument now is, that in the cash account in the agent's ledger, there stood a balance to the credit of cash of $562 39, and that consequently, even upon the hypothesis that the agent had improperly credited himself with the sum of $500, the correction should be made by erasing said entry, or by a neutralizing entry on the debtor side of the account, and that, adopting either mode, there could still remain due to the complainant on the cash account, a balance of $62 39. It is obvious, however, that this mode of getting rid of the charge, assumes the correctness of the entire cash account, which with the exception of the item of $500, was not put in issue. The defendant, by the amended answer, specifically charged that the complainant was responsible for this sum of $500, paid to the Farmers' Bank of Maryland under the circumstances therein detailed. The parties went to trial upon this specific allegation and none other. In no part of the pleadings was it pretended that this item of $500 should not be debited to the complainant, because there stood a cash balance to his credit of a larger amount. If such defence had been set up by the pleadings, the entire cash account of the complainant would have been open for examination, and it is of course impossible to say to what results such an examination would have led. It has been several times

said that, as a general rule, the parties must be limited to the items of surcharge and falsification specified in the pleadings. This is indispensable to prevent surprise, and it must be quite apparent that the defendant, by the pleadings in this cause, had no notice that an attempt would be made to extinguish this charge of $500, by showing in evidence that a larger cash balance stood on the ledger to the credit of the complainant. The first and second exceptions of the complainant, which are directed against this charge, cannot therefore be sustained, nor can the third exception, which complains of the charge for interest on the principal sum.

The claim for interest could not well be disputed, supposing the principal sum to be due, unless some equitable objection to its allowance could be presented. But the only objection is the existence of the cash balance on the agent's ledger. If, however, the cash account in the ledger could be looked to for the purpose of getting rid of the claim for interest, I can see no good reason why it might not be permitted to extinguish the principle also. It cannot, in my opinion, have any influence one way or the other. It is not involved in the pleadings, and must be disregarded altogether.

The defendant's first exception objects to the allowance to the complainant for the use of the Savage Railroad. In the former, as well as in the last opinion of this Court, the complainant has been treated as the sole proprietor of the railroad. Whatever was advanced or paid on account of that road was considered as advanced to and paid for him, and whatever was to be paid by the defendant for the use of the road was to be credited to him. It is said in this exception of the defendant, that the complainant's bill, and his Exhibit No. 4, recognises and admits that the defendant made certain payments to the stockholders of said Company, which should be deducted from the sum allowed the complainant for the use of the road. But these admissions and recognitions, such as they are, were in the record when the opinion and order of the 22d of November, 1848, was passed. By that opinion and order, the complainant was considered and adjudged to be the Railroad Company, and

entitled to be credited and liable to be charged accordingly. And upon appeal, the Court of Appeals say emphatically, that they "concur in the opinion and decision of the Chancellor." And in the last opinion of this Court, it is said, "the decision that the complainant is to be regarded in this cause as the sole proprietor of the road, and entitled to be credited with whatever may be considered proper to be paid for its use by the Savage Manufacturing Company, must stand unchanged."

When this cause was last before the Court, in view of the evidence introduced after the decision of 1848 was made, I deemed it proper to reduce the allowance from ten per cent. to six per cent. on its cost, to be paid by the Cotton Company for the use of the road, and $100 in addition, for repairs. The Auditor has stated the account in conformity with the last opinion, and consequently the exceptions of the defendant thereto must be overruled. In the second part of the third exception it is alleged that all the repairs needed by the road, during the period it was used by the defendant, were made and paid for by the defendant. There does not appear to me to be any evidence of this allegation.

The defendant's first exception to the account F, grows out of the exceptions to the account E, and has already been disposed of.

The second exception to the account F objects to the allowance of $119 98, received from Samuel Jackson for rent, upon the ground that the persons who received it had no authority on behalf of the defendant to give receipts, and because it has not been proved that said sum went, in point of fact, into the funds of the defendant. But the authority of these persons to give the receipts was adjudicated in the opinion of October last, and I agree with the Auditor, that the proof does show that the money was paid into the defendant's store, and consequently enured to the benefit of the defendant. The exceptions, therefore, will be overruled.

The only remaining question relates to the form of the decree. It appears by the proceedings that the settlement, which the bill impeaches, was made on the 1st of June, 1844. Ac-

cording to that settlement, the complainant appears to have been indebted to the defendant, on that day, in the sum of $7,685 98, and to this was added, under the circumstances which the record discloses, the sum of $1,936 34, whereby the amount was increased to $9,632 32; and on the same day it was agreed that this claim should be released, in consideration of a transfer by the complainant and his trustees to the defendant, of an amount of the complainant's stock in the Company representing said sum. The agreement, though dated the 1st of June, 1844, was not carried into effect until the 20th of the then ensuing July, the delay being caused by the necessity of procuring the signatures of the requisite number of shareholders, according to the requirements of the charter. But these being obtained, the complainant, together with his trustee, on the last-named day, did transfer to the defendant the requisite amount of stock; that is to say, an interest representing the sum of $9,632 32, and thus the agreement on both sides was consummated.

But it now appears, as the result of the accounts stated by the Auditor, under the directions of this Court (which accounts are to be confirmed), that the sum actually due from the complainant to the defendant, in June, 1844, instead of being $9,632 32, was only $4,764 06, and that consequently there has been an over-payment of $4,868 26, and the question is as to the character of the decree by which the complainant is to be redressed.

In his bill he alleges that the capital stock of the Company, which in the year 1839 amounted to $108,200, being reduced by the merger of $9,632 32 of the complainant's stock, was, after the transfer of that stock, brought down to $98,567 68, and the prayer is, that an account may be taken, under the direction of the Court, of the transactions specified in the bill; and if on said accounting any balance should be found due the complainant, payment thereof may be decreed, and a re-transfer of the stock awarded him, and if any balance is ascertained to be due from him to the Company, he may be declared en-

titled, on payment of said balance, to a re-transfer of his said stock, and for general relief.

The defendant, in answering that part of the bill which speaks of the merger and reduction of the capital stock of the Company, by the transfer to it of the complainant's stock, says the transfer "had the effect, by operation of law, to merge, extinguish, and annihilate so much of the capital stock of the respondent, and practically to reduce it from an amount of $108,206 83, at which it stood before the transfer, to the amount of $98,574 51, being a reduction to the extent of $9,632 32."

Both parties, therefore, speak of the transfer as effecting a merger of the stock transferred; but they differ in this, that the complainant insists, that the stock merged may be re-created, or resuscitated, by the decree of this Court, directing the defendant to make a re-transfer to the complainant. Whilst the defendant maintains, that the stock was absolutely annihilated by the transfer to the Company, the transfer enuring to the benefit not of the defendant in its corporate capacity, but to the benefit of the respective proprietors of shares in their natural capacities.

Before expressing an opinion upon the power of this Court to resuscitate this stock, or on the propriety of exerting the power, if it exists, it may be well to dispose of an objection, founded upon the order of the 22d of November, 1848, by which it is supposed this question was adjudicated.

In the opinion, and also in the introduction to the order, it was declared that the charge of fraud in fact, in procuring the settlement of the 1st of June, 1844, was not sustained by the proof. And it was thereupon ordered, "that said settlement should stand and be established;" but liberty was given to the complainant to surcharge and falsify the accounts, upon which the settlement was founded, in certain particulars therein specified. The settlement of the 1st of June, 1844, by which the amount supposed to be due from the complainant to the defendant was ascertained, not being obnoxious to the imputation of fraud in fact, it was adjudged that it should stand until the

accounts upon which it was founded should, in the particulars specified, be investigated. But it was not intended by the order to place the stock, by which the claim was paid, beyond the reach of recall, if in the further progress of the cause a decree to that effect should be necessary to meet the justice of the case. If the settlement had been overthrown entirely, a general account would have been ordered, wholly irrespective of it, and every item on both sides of the account would have been exposed to investigation, and required to be sustained by proof. But this was not done. It was the opinion of the Court, that the settlement was not procured by fraud; but that, in certain respects, the accounts upon which it was based were erroneous, and therefore, that though the settlement should stand, in so far as it was not impeached, the plaintiff might show it to be wrong in the particulars and to the extent specified in the opinion of the Court.

In the argument of this cause in the Court of Appeals, upon an appeal from the order of November, 1848, the counsel for the complainant appear, by a statement of their points with which I have been furnished, to have objected to that part of the order which declared "the settlement should stand and be established," and to have insisted that the settlement should have been annulled and an immediate re-transfer of the stock decreed. And this, it is argued, shows that in the opinion of the complainant's counsel the order settled the question in regard to the stock. Such, however, is not my view of the point; but conceding the counsel may so have understood the order, it certainly cannot be insisted that the Court is bound by such interpretation of it.

In passing the order referred to, this Court did not intend to adjudicate the question now presented. It was not the design of that order to pass upon the form and character of the final decree, which should be passed in the cause when the accounts between the parties should be taken. And I shall now, therefore, very briefly state my views upon this question.

Cases have been cited to show, that if the shares of an incorporated company are transferred to the corporation, they

merge and are extinguished. In the case of *Ex parte Holmes*, 5 *Cowen*, 426, which involved the right of voting certain shares of stock in an incorporated company, which stood in the names of persons as trustees for the corporation, it was said by the Court, that the corporation may, from necessity, take their own stock in pledge, or payment, and that they may keep it outstanding in trustees to prevent its merger, and convert it to their security—implying, of course, that a transfer to the corporation itself would operate as a merger; and I presume, unless there is some provision in the charter to the contrary, that a transfer of its own stock directly to a corporation, would have that effect.

But it does not follow, that though the shares transferred to the corporation are merged for the time being, that they may not be subsequently revived. It is believed that but few of the banking institutions, in this State, are not authorized to take their own stock in payment of, or in pledge to secure debts due them; and whatever may be the temporary legal effect of the transfer, it has always been supposed, and the practice has been in conformity with such general understanding, that they were authorized to re-issue the stock whenever they thought fit to do so. It never was the understanding, so far as I am informed, that such transfer of its own stock to a bank, had the effect to lessen its capital. In the case of *Ex parte Holmes*, before referred to, the Court distinctly recognised the right of the company to take its own stock in pledge, or payment for debts due it, a right, they say, resulting from necessity; and it cannot well be doubted, that, having the right thus to take, they had the further right to sell and re-transfer to realize the money due them.

But if it were conceded that the shares of the stock transferred by the complainant to the defendant, in 1834, were so entirely merged as to be incapable of resuscitation, there would be no difficulty in restoring to the complainant the number of shares originally standing in his name, if the justice of the case requires it.

By the Act of 1821, ch. 201, sec. 2, the capital stock of this

corporation was limited to $150,000, but by a supplement, passed in 1825, ch. 169, it was enlarged to $300,000, a sum far exceeding the actually subscribed capital now or ever existing. If, therefore, the shares of stock transferred by the complainant to the Company cannot be called back, why may not the defendant be required to issue new shares to the same amount, if that course should be deemed necessary to do justice between the parties? The amount of the capital would still be largely within the limits of the charter. I can see no objection to this course, provided the circumstances of the present case call for that kind of relief.

Cases are abundant to show, that if a deed is executed under suspicious circumstances, or is merely constructively fraudulent, this Court may, and should, permit it to stand as a security and indemnity to the grantee. It is not to be set aside absolutely, as would be done if found to be fraudulent in fact; but this Court, unlike a Court of Law, which can take no middle course, and must pronounce one way or the other upon the validity of the deed, may adopt the milder and more equitable course, and suffer it to stand, not as an absolute conveyance, but simply as a security for the sum really due.

In this case it has been several times said, and is repeated, that there is no foundation whatever for the charge of fraud, in fact, against any of the parties to the transaction in question. But still, the judgment of the Court was, and that judgment has been approved by the Court of Appeals, that the settlement of June, 1844, by which the sum supposed to be due from the complainant to the defendant was ascertained, was, in the contemplation of a Court of Equity, constructively fraudulent, and there can be no doubt that the transfer of the complainant's stock to the defendant was made because—and only because—of that supposed indebtedness. The agreement and transfer signed by the parties conclusively prove this. A purchase and sale of this stock was not intended, but a transfer in payment of a supposed pre-existing debt.

Assuming that the Court has the power to direct a retransfer of this stock to the complainant, or to order new

shares to be issued to him for an equivalent amount, he has an undoubted equity, at least, to demand such re-transfer, or new issue for any excess beyond his actual indebtedness to the Company. If instead of an equivalent in money, he calls for his stock, what justice can there be in denying him? His claim to restitution to the extent of the excess seems to me to be unquestionable, and under the circumstances of the case, I think he has a right to demand the whole amount of stock transferred by him, upon his paying the amount really ascertained to be due from him. In other words, that the transfer shall stand only as a security for the sum really due.

It will be borne in mind that one of the grounds upon which much stress was laid in directing the settlement to be corrected, was the feeble condition of the complainant's mental faculties, when the accounts upon which the settlement was based were presented to him. In the judgment of the Court, he did not and could not understand them. The same motive which induced the Court to look with an indulgent eye upon the acts and conduct of the complainant in regard to the settlement, cannot be without its influence when the transferring his stock, the result of the settlement, is under consideration. They were contemporaneous acts, performed by a party whose intellect, to a great extent, had sunk before the force of physical disease, and therefore present a case in which it is the duty of the Court to do him full and complete justice, taking care always to do no injustice to the other side. If the money actually due the defendant is paid, it is all it can be entitled to, and all, of course, it can reasonably ask for.

It is not, in my opinion, easy to draw a substantial distinction in principle between this case and the case of *Boyd* vs. *Dunlap*, 1 *Johns. Ch. Rep.*, 478, where it was held that though a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity, yet it is otherwise with a deed obtained under suspicious circumstances, or which is only constructively fraudulent. For, in that case, which was a bill filed by the creditors of the grantor to vacate a deed made by their debtor to his

son, the Court, though, refusing to set it aside absolutely as fraudulent in fact, ordered it to stand as security for the sum really due from the father to the son.

The opinion of Chancellor Kent in that case is not only supported by the authorities cited by him, but meets full confirmation in the case of *Wood* vs. *Abrey*, 3 *Madd.*, 216, where a deed made for an inadequate consideration by vendors who were in great distress, and without professional assistance, was set aside upon the plaintiff's repaying the amount of the purchase-money, and by what was said by the Master of the Rolls in *Daubeny* vs. *Cockburn*, 1 *Merivale*, 643, "that in ordinary cases of fraud the whole transaction is undone, but if a partially valuable consideration is given, its return is secured as the condition on which equity relieves."

I am of opinion, therefore, that under the circumstances of this case, the complainant has an equity to have his stock returned to him, upon his paying to the Savage Manufacturing Company the amount of his indebtedness to it, as ascertained by the last report of the Auditor.

The counsel, therefore, may prepare a decree ratifying and confirming the Report of the 12th of November last, and directing the defendant to issue to the complainant, of the capital stock of the said Manufacturing Company an interest representing the sum of $9,632 32, provided the said complainant shall, by a certain day to be limited by and named in the decree, pay or tender to the defendant the sum ascertained by the said report to be due from the said complainant to the defendant. And in that case neither party shall recover costs against the other. And by the decree power must be reserved to the Court to pass such further order or decree as may be necessary, in case the complainant shall make default in paying or tendering to the defendant the amount ascertained as aforesaid to be due to the defendant by the said Report.

ALEXANDER, for Complainant.

WILLIAM SCHLEY, and GEORGE H. WILLIAMS, for Defendant.

JOHN HERR AND WIFE,
vs.
LEMUEL BIERBOWER.
} JULY TERM, 1851.

[INJUNCTION TO RESTRAIN TRESPASS.]

AN injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, in the ordinary course of law.

But if the trespass goes to the destruction of the inheritance, or the mischief be not susceptible of perfect and adequate pecuniary compensation at law, or if the acts done or threatened to the property be ruinous, or irreparable, or impair its just enjoyment in future, the Courts of Equity will, without hesitation, interfere by injunction.

Taking possession of a portion of a city building lot, and digging upon it a foundation, and erecting a building upon such foundation, thereby reducing the front of the lot so as to prevent the plaintiff's building upon it himself in the most advantageous mode, goes to the destruction, *pro tanto*, of the estate, and impairs the just enjoyment of the property in future, and will be restrained by injunction.

But the erection of a fence of wood upon a part of such lot, and the admission of such a trespass, does not, *per se*, furnish a sufficient claim to the aid of a Court of Equity by injunction.

[The bill, in this case, was filed for an injunction to restrain the defendant from building upon, or otherwise dispossessing the complainants of a certain lot, situated in the city of Baltimore. The allegations of the bill and answer are fully stated in the opinion of the Chancellor, delivered upon the hearing of the motion to dissolve the injunction which had been granted upon the bill.]

THE CHANCELLOR:

The question which arises in this case, is one which has repeatedly engaged the attention of this Court, and has been deliberately and carefully considered upon several occasions.

Though difficulties and doubts may and do arise in the application of the principle by which such cases must be governed,

there can now, since the cases of *Amelung* vs. *Seecamp*, 9 *G. & J.*, 468, and *Hamilton* vs. *Ely*, 4 *Gill*, 34, were decided, be no controversy about the principle itself. It being now conclusively settled "that an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation in the ordinary course of law." "It must," say the Court, in the first of the above-named cases, adopting the language of Chancellor Kent in *Jerome et al.* vs. *Ross*, 7 *Johns. Ch. Rep.*, 315, "be a strong case of trespass, going to the destruction of the inheritance, or the mischief is remediless, to entitle the party to interference by injunction." Or, as the principle is stated by Judge Story, "that Courts of Equity interfere in cases of trespass, that is to say, to prevent irreparable mischief, or to suppress multiplicity of suits, and oppressive litigation;" 2 *Story's Eq.*, *Sec.* 928.

But if the trespass does go to the destruction of the inheritance, or the mischief be not susceptible of perfect pecuniary compensation, and for which the party cannot obtain adequate satisfaction in the ordinary course of law, or if, in the language of the section just quoted from the commentaries of Judge Story, "the acts done, or threatened to the property, would be ruinous, or irreparable, or impair the just enjoyment of the property in future," the Courts of Equity will, without hesitation, interfere, as otherwise there would be, as is said by the author, "a great failure of justice in the country."

The facts stated in the bill, in the case now before this Court, in my opinion, bring it within the principle thus settled. After setting forth their title, and describing specifically the location and dimensions of their lot, and the location and lines of the lot claimed by the defendant, the bill proceeds to say that the defendant, disregarding the courses and distances of the lines of these lots, had entered upon, and disseized the plaintiffs of three feet of the front of their lot, more or less, and had commenced digging a foundation, and building a dwelling or other house, on a part of the plaintiffs' lot, and had encroached on

another part by placing upon it a fence of wood, &c., "and that the value and use of their lot, as a building lot, was permanently injured by the deprivation of three front feet as aforesaid, there no longer being space there to erect two dwellings of twelve and a half feet front, such as are erected and rent readily in that neighborhood."

Now, it appears to me very clear, that upon this statement of facts the plaintiffs were entitled to the interference of this Court by injunction, to prevent the threatened mischief. The acts complained of went to the destruction of the plaintiffs' estate. Taking possession of a portion of their lot, and digging upon it a foundation for a building, and erecting a building upon that foundation, thereby reducing the front of their lot so as to prevent their building upon it themselves, in the mode which would be most advantageous, surely goes to the destruction, *pro tanto*, of the estate, and "injures the just enjoyment of the property in future." It is not a mere trespass for which pecuniary compensation may be obtained in the ordinary course of law; but the plaintiffs' estate would be destroyed to a certain extent, by rendering it unfit for the erection of two houses, in which way, they swear, it would be the most profitable to improve it. And it is no answer to say, that if the plaintiffs recover the land in dispute in an action of ejectment they would get the wall which the defendant put upon it, because that wall, if suffered to remain, would still prevent their erecting two houses upon their lot. The wall would have to be removed, and the foundation filled up, before they could have the just use and enjoyment of their property.

But though the bill, in my opinion, does state facts which entitle the complainants to the aid of this Court by injunction, the case wears a very different aspect when considered in connection with the answer. The answer first denies the disseizin as charged, and it likewise expressly denies "that the defendant has commenced digging a foundation, or building a dwelling or other house on any part of any lot belonging to the complainants or either of them," &c. And then, after stating that the defendant, and those under whom he claims, have been

in undisputed possession of the strip of land in question for upwards of forty years, and when he purchased and took a deed for said lot there stood upon it a house, extending over and covering said disputed strip of land, which said house had occupied its then position for more than forty years, "that having purchased the premises aforesaid, he (the defendant) took possession thereof and of the house thereon, with the consent of all the heirs and representatives of the former owner, under whom he claimed, and being desirous to improve said property, he pulled down a portion of the old house in order to rebuild the same, but as before, he denies that he has commenced digging a foundation or building a dwelling, as in said bill is alleged," "the old foundations of the former building remaining in the ground where they have always been, the defendant not having removed or interfered with them, but intending merely to put new walls upon them in lieu of the upper walls of the building, taken down as aforesaid; the end wall on the side claimed by the complainants being still standing."

Such is the case presented by the bill and answer, and it will be seen that, according to my view of the equity of the bill, there no longer remains a foundation upon which it can rest, and that the injunction must be dissolved, unless, indeed, the answer is overcome by the depositions which have been taken under the order of the 9th of June last.

The bill alleges that the defendant, without right or title, entered upon a portion of complainants' lot disseized them, and commenced digging a foundation and building a dwelling, &c. The answer says that this is not so; that defendant, and those under whom he claims, have been in possession of this property for upwards of forty years; that he has not commenced digging a foundation and building a house as charged, but that he simply pulled down the walls of an old house which had occupied the same site for upwards of forty years upon the said lot, and only proposes to put new walls upon the old foundation. There is, therefore, so far as digging a foundation

and erecting a house is concerned (if the answer is to be credited), no encroachment upon the plaintiff's possession, and no injury which has not existed and been acquiesced in for a period which, under ordinary circumstances, would ripen into perfection a title originally defective.

The plaintiffs' counsel, it is true, makes an agreement to show that the deeds which the defendant relies upon do not clothe him with the title, but that is a question properly determinable by another tribunal. This Court cannot interpose its extraordinary power, unless it be to prevent an admitted or proved injury, which cannot be redressed in the ordinary course of law. If it be true that the defendant, and those under whom he claims, have held this piece of property for the period stated in the answer, and he is only about to pull down and re-erect, upon the old foundation, a house which has stood there so many years, surely a Court of Chancery should withhold its hand, and leave the parties to litigate the matter at law. The question in that event is a purely legal one, with which this Court has nothing to do.

Upon an examination of the proof, there would seem to be no doubt that the statement of the answer with regard to the possession, and with reference to the fact that the new walls are about to be erected upon the old foundation, are substantially if not literally true, and therefore the ground upon which the title of the plaintiffs to the interposition of the Court rested, is removed.

The fact that the trespass with regard to the fence is admitted certainly *per se*, furnishes no sufficient claim to the aid of a Court of Equity by injunction. This is unquestionably no destruction of the inheritance, or irreparable injury for which the Courts of law are incompetent to compensate in damages. On the contrary, it is a mere ordinary trespass, for which a jury is the peculiar and appropriate tribunal to give redress.

Several questions have been presented and ingeniously discussed by the counsel in their written arguments, into an examination of which I do not propose to enter, having, in what

has been said, indicated the grounds upon which my opinion rests. An order will be passed dissolving the injunction.

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BARRY, for Complainant.
WALLIS and THOMAS, for Defendant.

IN THE MATTER OF THE ESTATE OF NOTLEY YOUNG. } DECEMBER TERM, 1851.

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[HOTCHPOT—PAROL PROOF TO CONTRADICT OR VARY THE TERMS OF A DEED—CONSTRUCTION OF DEEDS—ACT OF 1825, CH. 50, RELATING TO MORTGAGES—CHANCERY PRACTICE—ATTORNEY—LIMITATIONS.]

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THE right which the heirs have, that the estate advanced should be brought into hotchpot, is a legal right, and no alienation or incumbrance placed by the heir advanced upon the property given by way of advancement, can defeat it.

The insolvency of the personal estate of the ancestor constitutes, in a Court of Equity, no objection to bringing an advancement of personalty into hotchpot with real estate, or the proceeds of real estate.

Where a deed is not attacked upon the ground of fraud, accident, or mistake, parol evidence is inadmissible to add to, vary, or change its terms.

When a deed is impeached for fraud, by disproving the consideration expressed in it, a different consideration changing its character cannot be set up.

Where the consideration has not been disproved, parol evidence of the same kind of consideration, differing only in account, may be offered to rebut any imputation of fraud attempted to be cast upon the deed.

A husband executed a mortgage to secure a debt, and after payment thereof the mortgagees were to hold the property, or convey it to the appointee of the grantor's wife for her separate use; and on the same day, the husband and wife assigned to the same mortgagees, the wife's interest in the real estate of her father. HELD—

That the mortgagees had a perfect right to resort to either, or both of these securities, for the payment of their debt; and all that the wife can demand is, that after payment of their claim, they shall convey to her appointee the property mentioned in the mortgage of the husband.

A stipulation in a mortgage to secure a specific sum, that it should cover

such further sum as might become due the mortgagees for costs, charges, and commissions, is not effectual since the Act of 1825, ch. 50.

The policy of that Act is, that the utmost extent to which the mortgaged premises can be made liable, must appear upon the face of the instrument; and provisoes that the mortgage shall be a security for future liabilities, or advances, are forbidden by it.

Where a term intervenes after the passage of an order, it is considered as enrolled, and cannot be reheard upon petition; the only remedy in such cases, is by bill of review for error appearing upon its face, or new matter discovered since.

An administratrix employed an attorney to collect certain claims due the estate of the intestate; and suits were instituted upon some and judgments recovered upon others, when she died, and the claims were passed to the administrator *d. b. n.* HELD—

That under such circumstances, the administrator *d. b. n.* has the right to change his attorney; but the commissions should be equally divided between the attorney first employed and the one who may collect the money.

The plea of limitations only enures to the benefit of the party pleading it.

[The real estate of Notley Young, deceased, who died intestate, was sold under the proceedings in this case, in aid of his personalty, for the purpose of paying his debts, and distribution amongst his heirs-at-law. Several questions arose in the progress of the cause, upon which the Chancellor delivered opinions. The first question was upon two petitions of Clement Young and Julia F. Young, infant defendants and heirs-at-law of the deceased, by William A. Brady, their guardian *ad litem* and next friend, filed on the 14th of February, and 25th of March, 1851. One of these petitions alleges that Notley Young, the intestate, in his lifetime advanced to his daughter Heloise, the wife of George H. Smith, a negro slave of the value of $1,000, and stock in the Bank of Metropolis to the value of $2,000, that this advancement so made ought to be treated as made on account, and in part of the share of the intestate's estate, to which the said Heloise is entitled, as one of his children, heirs-at-law, and personal representatives; that by the Auditor's account reported in this cause, there is shown to be a large surplus of the proceeds of said estate, which has been distributed equally to said Smith and wife and other heirs-at-law, by which apportionment petitioners are

aggrieved, and they therefore pray that the case may be remanded to the Auditor, to restate his account, so as to bring the said advancement into hotchpot with the residue of said estate now to be distributed, and that Smith and wife may be chargeable with said advancement, and for general relief.

The other alleges that the intestate, by deed of gift dated 4th of March, 1846, conveyed to his daughter Martha certain real estate lying in the District of Columbia, now of the value of $4,000, that by another deed of gift he also conveyed certain slaves to the said Martha of the value of $3,000; that the value of this real and personal estate exceeds a child's portion of the intestate's estate, and prays that it may be brought into hotchpot in the division of the fund now in Court. This petition also alleges the death of the said Martha, leaving a will, and makes her devisees and legatees parties to the proceedings. The answers and the facts proven in the case are sufficiently stated in the following opinion of the Chancellor, delivered at the hearing of these petitions on the 11th of November, 1851.]

THE CHANCELLOR:

This case was submitted during the sittings of the term, upon the petitions of Clement Young and Julia F. Young, infant defendants, by their guardian, William A. Brady, and now, at the close of the sittings, is laid before the Court in conformity with the rule.

The petitions, which were filed on the 14th of February and the 25th of March, 1851, allege that Notley Young, the intestate, and the father of the petitioners, in his lifetime conveyed gratuitously, as an advancement to his daughters, Martha Young and Heloise Smith, certain parcels of his real and personal estate, which the petitioners insist should be treated as a part of the shares to which the said Martha and Heloise would be entitled, as two of his heirs-at-law and personal representatives.

The personal estate of the said intestate proving inadequate to pay his debts, upon a bill filed by his creditors, the realty

has been sold in aid of the personalty, and as appears by the report of the Auditor, a considerable surplus of the proceeds of the realty remains for distribution among the heirs-at-law, which by said report has been equally distributed, no deduction being made from the shares assigned to said Martha and Heloise, on account of the property so advanced to them. And the petitioners pray that the accounts may be remanded to the Auditor, with directions to restate them, so as to bring the said advancements into hotchpot with the residue of the said estate now to be distributed.

The answer of Heloise Smith and her husband, George H. Smith, may be treated as denying the allegation of the advancement to the wife, though its statements are not very explicit or satisfactory. But, conceding that it does deny the allegations, I consider the proof of the advancement quite strong enough to overthrow the answer, and I am also of opinion, that if the property so advanced to Mrs. Smith, in case any of the personal estate remained for distribution, was equal to or superior in value to her share of such surplus, she would be excluded unless she brought it into the reckoning. *Act of* 1798, *ch.* 101, *sub-ch.* 11, *sec.* 6, *State use of Wilson and Wife* vs. *Jameson*, 3 *G. & J.*, 442.

Martha Young being dead, the petition setting up the advancement to her, which consisted of real and personal estate, has been answered by her executor, devisees, and legatees, and certain parties claiming under a deed executed by her on the 20th of March, 1848, for the purpose of indemnifying one of them from responsibility, as her surety in her bond as administratrix upon the estate of her father. It is objected, on the part of the respondents, that inasmuch as it does not now, at this time, certainly appear, whether the surety in the bond will or will not be damnified, the proceeds of the real estate should not be impaired or withdrawn from the control of the trustees under the deed, until the final settlement of the estate of the said intestate shall show conclusively that no such loss or damage will result to the surety. They say that when the responsibility was assumed, and the deed of indemnity was

taken, they had no notice of the advancement, and consequently that the advancement should not be brought into hotchpot, so as to diminish her share of the proceeds of the real estate now to be distributed, as thereby the fund to protect her surety from loss would be diminished.

The answer to this is that the right which the heirs have, that the estate advanced should be brought into hotchpot, is a legal right, and that no alienations or incumbrances placed by the heir advanced upon the property, given by way of advancement, can defeat that right. If it were otherwise, it would at all times be in the power of the heir receiving the advancement to escape the application of the law upon the subject, by disposing of or incumbering the estate given him by his ancestor.

These parties further insist, that forasmuch as the personal estate is insolvent, and the fund now for distribution results from the sales of real estate, they are under no obligation to answer that portion of the petition which refers to donations of personal estate, the ground assumed being that real estate is to be brought into hotchpot only with real estate, and personal estate only with personal estate.

This position, however, seems to me in opposition to the opinion of the Court of Appeals in the case of the *State use of Wilson* vs. *Jameson*, 3 *G. & J.*, 342, in which it is very distinctly intimated that a Court of Equity will not suffer itself to be baffled by any technical objection of this nature, but will take care, in cases like the present, that the rights of all parties in interest are adjusted "agreeably to the rules of equity, amongst the most just of which is equality." Indeed, from the language of the Court in the case referred to, it may be very fairly inferred, that in an action at law on an administration bond, to recover a distributive share of the personal estate, the defendant may avail himself to defeat the action of an advancement to the plaintiff of real estate, if he avers in his pleadings, and shows by the evidence that the property advanced was of equal or superior value to the plaintiff's share of the estate, though it was said that a Court of Equity would be the more appropriate tribunal for the settlement of such questions.

And the same view of the subject is plainly announced by the Court of Appeals, in the case of *Hayden* vs. *Burch et al.*, 9 *Gill*, 79. I am, therefore, of opinion, that the insolvency of the personal estate constitutes in this Court no objection to bringing the advancement in question into hotchpot, with the real estate or the proceeds of the latter now to be distributed.

[The next opinion was delivered upon the petition of George F. Maddox, as trustee of Heloise Smith, filed on the 25th of February, 1851. This petition alleges that George H. Smith, having antecedently used a large amount of his wife's property, on the 27th of January, 1849, conveyed to Neale and Luckett, of Baltimore, certain personal property, by way of mortgage, to secure a debt of $3,336, due by him to them, upon consideration that after payment of their debt, they should hold and retain, or convey to such person or persons as the said Heloise might, by writing, appoint, to and for her sole, separate, and exclusive use, as will appear by reference to said mortgage, filed as Exhibit A. That in consideration of making this mortgage and conditions therein contained, the said Heloise and her husband, on the same day, mortgaged to Neale and Luckett the interest of said Heloise in the estate of Notley Young, her deceased father, as a conditional security for their said debt, as appears from Exhibit B, said mortgage. That Neale and Luckett have filed Exhibit B in this cause, and the Auditor has allowed them the amount of said debt out of said Heloise's share of the estate of said Young, as appears by the Auditor's account. That notwithstanding said allowance, by which Neale and Luckett will receive full satisfaction of their debt from said interest of said Heloise, they afterwards sold the property mortgaged to them in Exhibit A, the holding or conveying of which to the appointee of said Heloise, was the only consideration upon which she executed Exhibit B. That by deed, duly executed, the said Heloise appointed George C. Morgan and the petitioner her trustees, to hold and receive all the property, real and personal, she might have or be entitled to; and that said Morgan has refused to act as one of

said trustees, whereby petitioner is left the sole trustee. That Exhibits A and B are evidence of the facts and conditions therein contained, and the petition then prays that the mortgage debt allowed Neale and Luckett, in Account C, may be disallowed and rejected, and for general relief.

The answer of Neale and Luckett denies that the mortgage executed by Mrs. Smith was ever intended or received as a conditional security, but was executed and received as an absolute one, to be made available at the very earliest proper moment, and that the securing any interest in her husband's property to her, was any condition or consideration precedent to her executing the same, and avers that a greater portion of the property mortgaged to them by Smith, belonged to the estate of his father, and that they, having consulted counsel as to the title thereto, surrendered their interest in the same to the administrator *d. b. n.* of said Smith's father; that they then sold that portion which belonged to Smith, from which they realized $500, with which they credited him, and that there still remains due them a considerable amount over that awarded them by the Auditor's account.

Upon this petition and answer, the Chancellor delivered the following opinion, on the 20th of November, 1851, in which the facts of the case will be found sufficiently stated.]

THE CHANCELLOR:

Assuming that no technical objection exists to granting the prayer of the petition filed by George F. Maddox, trustee of Heloise Smith, on the 25th of February, 1851, the fate of the petition must depend upon the construction of the two deeds of the 27th of January, 1849, exhibited with it. For I entirely agree with the counsel, that these deeds are to be regarded as part and parcel of one and the same transaction, and that the rights of the parties are to be determined upon their legal effect, irrespective of the parol evidence, which being excepted to, must be rejected as inadmissible, there being no allegation or proof that any term or stipulation contained in them, resulted from fraud, accident, or mistake, or that from any one of

these causes, anything was omitted which should have been inserted. This principle is established by an unbroken current of authority; and it is equally well settled, that when a deed is impeached from fraud, by disproving the consideration expressed in it, a different consideration changing its character cannot be set up. *Betts* vs. *Union Bank*, 1 *H. & G.*, 186; *Clagett and Hill* vs. *Hall*, 9 *G. & J.*, 81; *Harris and Chauncy* vs. *Alcock*, 10 *G. & J.*, 248; *Cole* vs. *Albers and Runge*, 1 *Gill*, 412.

In this case, the deeds in question have not been impeached, by disproving the consideration expressed in them, and therefore, according to the doctrine of the case last referred to, it would be competent to offer evidence of the same kind of consideration, differing only in amount, to rebut any imputation of fraud which might be attempted to be cast upon them. But except under such circumstances, and for such purpose, it is in opposition to one of the best-established principles of the law of evidence, to permit the introduction of parol proof, to add to, vary, or change the terms of the written contract. 9 *G. & J.*, 91.

I therefore consider the parol proof offered in this case, in so far as it may affect the construction or legal effect and operation of the deeds, by showing that other considerations than those displayed upon their face, influenced the parties in executing them, as inadmissible, and shall proceed very briefly to examine into their merits, as they depend upon the deeds themselves.

The deed which is referred to as Exhibit A, is a mortgage executed by George H. Smith to Neale and Luckett, of sundry negroes, and other articles of personal property, to secure the payment of $3,336, due from Smith to the grantees, partly upon judgment, and partly upon drafts, the deed reciting that Neale and Luckett, in consideration of further security, had agreed to suspend executing their judgment, and further reciting that Smith, having paid to them and other persons large amounts of money of the separate estate of his wife, and that it was always intended, as it was just, he should repay

and secure to her the sums so advanced for him, or in payment of his debts, and the more especially, as his wife, by her deed of the same date, had pledged to the said Neale and Luckett, for the payment of the debt thereby secured, her whole undivided interest in the real estate of her father. The deed then proceeds to declare that the property thereby conveyed, is mortgaged to Neale and Luckett, to secure them the full payment of said debt, together with all lawful costs, charges, interest, and commissions; and that after such payment, they (the grantees) should hold and retain, or convey to such person or persons as the said Heloise Smith, by writing signed by her, may direct and appoint, to and for her sole and separate use.

The deed, marked Exhibit B, is executed by Smith and his wife. It recites the indebtedness of Smith, the husband, to Neale and Luckett, in the sum mentioned in the mortgage already referred to, the execution of that mortgage, the provision for the benefit of the wife; and that the execution of this deed by the husband and wife was one of the considerations upon which the deed of the husband was executed; and then says that "in consideration of the premises and of one dollar to them paid," they, Smith and wife, "have granted, &c., and by these presents do grant, &c., to the said Neale and Luckett, their heirs and assigns, all the undivided one-fourth part or interest of the said Heloise, in and to the real estate of her father, Notley Young, deceased;" "to have and to hold to them, the said Neale and Luckett, their heirs, &c., for ever, with full power to take and receive any notes, bonds, securities, or otherwise, which may or might otherwise belong, or be executed to said Heloise, or for her benefit, from or on account of any sale, division, or other lawful disposition of said property in settlement of said deceased's estate;" "provided that if the said debt, as aforesaid, shall be paid or satisfied with all costs, charges, and lawful commissions which may arise thereon, before such payment or satisfaction, &c., then these presents shall be void, otherwise to be and remain in full force and effect."

After the sale of the estate of Notley Young, the mortgagees,

Neale and Luckett, filed a copy of this mortgage or assignment of the interest of Mrs. Smith therein, in this Court, and the auditor, by an account marked C, appropriated, of the proceeds of sale to which Mrs. Smith was entitled, the sum of, $3,286 50 to Neale and Luckett, making a rebate from the face of the assignment, of $50 39, the debt from Smith to them not having all matured, and on the 15th of November, 1850, this account was confirmed by the Court's order, so far as the assignment to Neale and Luckett, and the claims of other parties, against which objections had not been interposed, were concerned.

The application now on the part of the petitioner, the trustee of Mrs. Smith, is, that the account C may be corrected, and this claim of Neale and Luckett disallowed and rejected. And this application is founded upon the following averment in the petition, "And your petitioner would further state, that notwithstanding said allowance" (meaning the allowance of the claim of Neale and Luckett, in account C), "by which said Neale and Luckett will receive full satisfaction and payment from the interest of Mrs. Smith in said estate, they, the said Neale and Luckett, afterwards sold the property mentioned in the mortgage from Smith the husband to them," thus in effect charging, though the amount to which the sales were made is not stated, that these gentlemen, if permitted to receive the sum awarded them in the account by the auditor, will be twice paid.

The answer of Neale and Luckett to the petition, states, that much of the property mortgaged by Smith to them, belonged to the estate of his father, and that the sales made of that portion which really belonged to him, amounted only to $500, leaving a balance due them exceeding the sum allowed them in the account of the auditor.

The argument now made on the part of the petitioner is, that inasmuch as Neale and Luckett have by their answer admitted that they surrendered to the administrator *d. b. n.* of the father of Smith, a portion of the property conveyed to them by the deed of Smith, they are incapable of performing that con-

dition of the deed which required them to hold the property for the separate use of Mrs. Smith. But this argument puts the petitioner's right to relief upon a ground different from that taken in the petition. The petition does not allege that they (Neale and Luckett) surrendered the property or any part of it to other persons, thereby defeating one of the stipulations of the deed, but that they sold it, though by the deed they should have held or conveyed it to some persons to be named by Mrs. Smith, for her separate use, that being the only condition upon which she had conveyed her interest in the estate of her father.

Assuming, however, that the petitioner, though he has alleged a sale, may rely upon the answer as a ground of relief, it does not by any means follow, that he has a right to take from Neale and Luckett, the money which has been awarded them in this case. The mortgage from Mr. Smith to these parties says, "that after the full payment of their claim, the said Neale and Luckett the property aforesaid shall hold and retain, or convey to such person or persons, &c., as Mrs. Smith, by writing, may direct and appoint, for her sole and separate use."

Now in their answer, they say that the larger portion of the property conveyed by the mortgage executed by Smith, was claimed by the administrator *d. b. n.* of his father, and that though they considered themselves amply secured by the assignment or conveyance of Mrs. Smith, they employed counsel to examine into the question of title, and their counsel being of opinion that the title of Smith was defective, they did agree to surrender *their interest* in the same to the administrator *d. b. n.*, "expressly reserving, however, all right or claim which Mrs. Smith might have thereto or therein, and offering to the counsel of Mrs. Smith the use of their names for the purpose of prosecuting or maintaining any such right, and tendering themselves ready to transfer to her trustee the interest in the mortgage which they might represent for her."

Now I cannot think, that by such conduct as this, Messrs. Neale and Luckett have forfeited their right to look to the proceeds of the property sold in this cause, for the reimburse-

ment of the debt due them from Smith. They had a perfect right, in my opinion, to resort to either, or both of these securities, for the payment of the debt due them; and all that Mrs. Smith can demand is, that upon satisfaction of their claim, they shall convey to such persons as she may appoint the property mentioned in the mortgage of her husband, for her separate use. This they offer themselves ready and willing to do, and it is all that can be asked of them. It is nowhere alleged or pretended that the safety of the property in the mortgage from Smith, the husband, has been endangered, or its value impaired by any act attributed to these parties; and so far from their being under an obligation to proceed first against the property mentioned in it for their satisfaction, it seems to me quite manifest, from the terms in which the two deeds are couched, that it was the desire and intention of the parties that satisfaction should be made out of the proceeds of the real estate, rather than from the personal estate mentioned in the mortgage executed by Smith, the husband. This conclusion, I think altogether reasonable, when it is remembered, that with reference to the proceeds of the real estate, no provision is made for securing these proceeds for the separate use of Mrs. Smith; whilst with regard to the personal property, mentioned in the mortgage, such a provision is carefully introduced. The inference, I think, is very fair from this, that it was the intention and expectation of the parties that the debt of Neale and Luckett should be paid out of the proceeds of the real estate.

It will be seen, from what has been said, that I do not think the title of Neale and Luckett to be paid their claim out of the proceeds of this estate, depends upon the recovery from them, by legal proceedings, of the personal property conveyed by the mortgagee. My opinion is, that assuming the facts to be as stated in their answer, and they are not only uncontradicted but sustained by the evidence, all that Mrs. Smith or her trustee can demand is, that when Neale and Luckett are paid, they will convey to Mrs. Smith's appointee, as provided for in the mortgage; and this they profess themselves ready to do.

I should have thought, however, but for the additional exception filed on the part of Mrs. Smith, that the letter from George C. Morgan, Esq., to the solicitor of Neale and Luckett, stating the fact of such recovery against Neale and Luckett, in Saint Mary's County Court, would be received as evidence. Being excepted to, however, it of course is incompetent proof, as, without an agreement, the record of the recovery must be produced.

But Neale and Luckett insist that they are not only entitled to receive from the proceeds of these sales the sum which has been allowed to them, but that out of that portion of said proceeds which has been awarded to Mrs. Smith, they should have an additional amount, upon the ground that her deed or assignment to them covers not only the sum specifically mentioned, but such further sums as might become due them for costs, charges, and commissions. It is true, the deed does contain such a stipulation; but, in my opinion, having been executed since the Act of 1825, ch. 50, the stipulation is not effectual. This question was considered by the Court of Appeals, in the case of *Cole* vs. *Albers and Runge*, 1 *Gill*, 423, 424. The mortgage in that case was to secure the mortgagees to the extent of $10,000. It was in evidence, that at the time of its execution there was due from the mortgagor a less sum; but that the mortgagees were responsible for him for other sums, and it was the intention of the mortgage, as shown upon its face, to protect them to the amount of the $10,000 mentioned as the consideration. The Court, in that case, held that the mortgage was a valid security to the amount of $10,000, because that sum being mentioned in it, no one could be deceived or prejudiced; but they express a decided opinion, that the practice of taking mortgages to secure specified sums with a clause providing that the mortgaged premises shall be held as a security for future liabilities or advances by the mortgagees to the mortgagor, is forbidden by the Act of 1825, ch. 50. That it is the policy of that Act, that the utmost extent to which the mortgaged premises can be made liable, must appear upon the face of the instrument, and that

words merely indicating that further responsibilities may be assumed or advances made by the mortgagee to the mortgagor, by which the creditors of the latter may be defrauded by combinations between the parties to the instrument or by the acts of the mortgagee alone, will not avail; and that notwithstanding the introduction of such terms, the mortgage will only operate, either in law or equity, as a lien or charge on the property mortgaged to the extent of the sum or sums which may appear on its face. This Act of Assembly, therefore, as interpreted by the Court of Appeals in the case referred to, limits these mortgagees, Neale and Luckett, to the sum which, upon the face of the instrument, is specifically secured by it.

But if this difficulty could be overcome, there is another objection to granting either the prayer of the petition, or the application of Neale and Luckett to rescind the order of the 15th of November, 1850, and reform the account which by that order was ratified and confirmed, which appears to me to be insuperable. Between the passing of that order and the filing of the present petition, the whole of the December Term intervened, from its commencement to its close; and the order, therefore, which is equivalent to a decree, must be regarded as enrolled. *Burch et al.* vs. *Scott*, 1 *G. & J.*, 393. And being so enrolled, the cause cannot be reheard upon petition, the only remedy of the party against whom the decree was passed, being a bill of review for error appearing on its face, or upon some new matter discovered since. *Ibid.*, 424.

I am, therefore, of opinion that the petition must be dismissed, and the order of the 15th of November, 1850, be permitted to stand.

[The last opinion in the case was delivered on the 17th of January, 1853, upon the question as to the allowance of commission to the attorney for the collection of certain claims due the estate, and upon exceptions filed to the Auditor's account. The facts, in relation to these points, sufficiently appear in the opinion itself.]

THE CHANCELLOR:

This case is submitted, and has been argued by counsel upon agreement and statement of facts, filed on the 20th of November, 1849, for the purpose of taking the opinion of the Court in reference to the right of the executor of Martha Young, who was the administratrix of Notley Young, to commissions claimed by John B. Brooke, Jr., the attorney employed by her to collect certain *choses in action* due the estate of her intestate. Upon the death of Martha, the administratrix, letters *de bonis non*, on the estate of Notley Young, were granted to Clement Young and C. C. Magruder, who, under the Acts of Assembly relating to the subject, claimed to have paid over to them the said *choses in action*, and this was done without prejudice to the right of the said Burke, to the usual commissions allowed attorneys upon collections. The statement of facts show that some of the claims had been reduced to judgment, whilst upon others suits had been brought, which were still depending.

The question presented by this statement is, whether the employment of an attorney to collect money, confers upon him the authority to proceed with the collection, notwithstanding his client may die, and the right to the claim devolve upon another, which latter may himself be an attorney, or may prefer intrusting the collection to some one else? I entertain no doubt, that under such circumstances, the party may change his attorney. The right is, I think, strongly implied in the case of *Henck* vs. *Todhunter*, 7 *H. & J.*, 275. Even when the title to the cause of action has not devolved upon another party by the death of him for whom the suit was brought, but when such is the case, and this other party is responsible, and is required to see that reasonable diligence is used for the collection of the money, it would seem impossible to deny him the privilege of selecting the agent to whom he may prefer confiding the duty.

I think, then, the administrators *de bonis non* had the right of placing these claims in whosesoever hands they pleased for collection; but in the exercise of this right, justice should be

done the attorney who had instituted the suits and obtained the judgments, and this, I think, will be accomplished by dividing the usual commission of five *per centum* equally between him and the attorney by whom the money may be collected, and an order will be passed accordingly; the said commissions to be paid out of the interest upon the proceeds of the sales of the personal estate already received or to be received.

In addition to the above question, exceptions to the Auditor's report have been submitted, in pursuance of a previous order, and upon these, the counsel of some of the parties interested have been heard.

The Auditor, in his report of the 2d of July, 1851, after enumerating certain claims not objected to, and others, in regard to which the objections have been removed, says, "All the other claims reported as having been objected to by the Auditor or the parties, are still subject to such objections."

Claims numbered 19 and 20 appear to be proved, but are subject to the plea of limitations, which plea, however, can only enure to the benefit of the party pleading it.

Since the report of the Auditor of the 2d of July, 1851, further proof has been taken in support of several of the claims, but upon many of these, it does not appear that the Auditor has yet reported, and I deem it better to submit the new proof to him for examination, before expressing an opinion upon its effect; with regard, however, to a few of the claims to which my attention has been particularly directed, and in reference to which the proof is supposed to be full, I purpose to express an opinion.

In my opinion, claims numbered 48, 49, and 51 are fully proved, and the defence of limitations relied upon by Smith and wife, is overthrown by the testimony of A. Anderson, filed on the 31st of December, 1850.

The claim No. 91, I think, is proved, though it appears to be subject to the plea of limitations, which has been relied upon by some of the parties. The same remarks apply to

claim No. 106, which, though proved, is likewise exposed to the operation of the same plea.

There is much difficulty in making a disposition of claims Nos. 41, 53, and 82. They appear to be proved, but limitations are relied upon by some of the parties, and the envelopes, upon which it is presumed the precise time when they were filed, would appear, have in some way been lost, and it is therefore impossible to fix the period with certainty. A deposition upon the subject, made by N. C. Stephen, Esq., the solicitor having the charge of the claims, has been filed, but this is rather indefinite and unsatisfactory. Under all the circumstances, however, the Chancellor thinks the presumption is, that the claims reached the office in due course of mail, and were filed the day the letter containing them ought to have been received, and the Auditor, in stating the account about to be ordered, will so assume.

ROBERT B. BRINTON, AND OTHERS,
vs.
HENRY HOOK, AND OTHERS.

SEPTEMBER TERM, 1850.

[FRAUDULENT CONVEYANCES.]

A CONVEYANCE is void, as against creditors, under the statute of Elizabeth, unless it be made upon a good consideration and *bona fide*.

A voluntary conveyance made by a grantor, not indebted at the time, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary.

But, if such conveyance was made with a fraudulent intent, and with a view to future debts, it may be successfully assailed by subsequent creditors.

A *post nuptial* settlement by the husband upon the wife is good as to subsequent creditors, provided there be no fraudulent intent, and if it be not made with a view to future debts.

A grantor conveyed nearly all his property *in trust*, 1st. For the use of the grantor and his wife during their joint lives, with power to them jointly to dispose of it absolutely; 2d. In case he survived his wife, he was to dispose of it at pleasure; and 3d. Whether he survived her or not, then to

such persons as he by will may appoint, and in case of failure of such appointment, then to his heirs-at-law. HELD—

That this deed is fraudulent and void against the creditors of the grantor, both existing and subsequent, because of the trusts in it in his favor.

[The deed attacked by the proceedings in this case, was executed by the defendant, Henry Hook, on the 2d of June, 1842, and conveys to the grantee, James H. Miller, a certain lot of ground in the city of Baltimore, and certain leasehold interests in other lots particularly described, with the buildings and improvements thereon, "and also all and singular the plate, household and kitchen furniture" of the grantor, "*in trust*, for the use of the said Henry Hook, and Sarah Hook, his wife, for and during the term of their joint natural lives, and for the use of the survivor during his or her life, with power of absolute disposal by them jointly, or by the said Henry Hook solely, if he shall survive the said Sarah, as is hereinafter expressed. And from and after the decease of the longest liver" of them, as to so much "as may remain undisposed of by deed or contract, as hereinafter provided for *in trust* for such person or persons, or for such uses and purposes as the said Henry Hook by his last will and testament, duly executed, shall have named, limited and appointed in relation thereto. But in default of such nomination, limitation, and appointment, then *in trust* for such person or persons, as would, by the now existing laws of the State of Maryland, be the heirs of the said Henry Hook, to take an estate in fee simple in lands by descent from him. But upon this *further trust*, nevertheless, to suffer and permit the said Henry Hook and Sarah his wife, jointly during their joint lives, and the said Henry Hook solely, if he shall survive the said Sarah, to sell, convey, and dispose of absolutely for ever, for such price or consideration as to them or him may seem fit, the whole, or any part, or parts, of the trust estate aforesaid, and the consideration or proceeds thereof to receive, and the same to appropriate, apply, and dispose of, in such manner as they or he,

as the case may be, shall think proper, and to and for no other use, trust, intent, or purpose whatsoever."

The complainants, in their bill filed on the 8th of January, 1849, allege themselves to be judgment creditors of said Henry Hook, upon a judgment recovered upon the 26th day of June, 1848, upon which a *fi. fia.* was issued, and returned *nulla bona* at February Term, 1849, of Baltimore County Court, in which said judgment was recovered. That at the time the debts, upon which said judgment was recovered, was contracted, the said Henry was in the actual possession and enjoyment of property situated in the city of Baltimore, of the value of several thousand dollars, which he had previously conveyed by the deed above referred to. That he has sold a part thereof, and applied the proceeds in satisfaction of a mortgage debt thereon, and to a small extent in satisfaction of complainant's judgment. That he has applied for the benefit of the insolvent laws, and a large amount is still due on said judgment. The bill then charges that said deed is fraudulent and void, and was made to hinder, delay, and defraud the complainant and other creditors of the grantor, and prays that it may so be declared and set aside, and the property sold for the payment of complainant's debt, and other creditors of the grantor, and for general relief.

The answer of Mrs. Sarah Hook, who answered separately, admits the deed of trust, and the sale of part of the property; but avers that she is wholly uninformed as to the other averments in the bill, and cannot, therefore, expressly admit or deny them, and requires complainants to prove them. The answer of Henry Hook admits the indebtedness as charged in the bill, the execution of the deed, and that he continued to possess and enjoy the property jointly with his wife according to the terms thereof. He also admits the sale of a portion of the trust property, and his application for the benefit of the insolvent laws; but expressly denies that the deed was made either to defraud, hinder, or delay creditors, but on the contrary, he avers that at the time of executing it, he was solvent and unembarrassed, and out of debt, and that he owned, at the time, other property not mentioned in said deed, and that com-

plainants were not his creditors at the time, but their claims were contracted and created long since the execution of the same, and he insists that said deed is perfectly legal and valid, and nowise fraudulent as against the complainants, or any one else.]

THE CHANCELLOR:

Upon a careful examination of the proceedings in this case, and reading and considering the arguments of the counsel for the parties, I am of opinion that the deed of trust of the 2d of June, 1842, from Henry Hook to James H. Miller, is fraudulent and void against the creditors of the grantor, either existing or subsequent.

It has been frequently decided, and is the undisputed law, that a conveyance is void as against creditors under the statute of 13 Elizabeth, ch. 5, unless it be made upon a good consideration, and *bona fide*, and authorities are abundant, to show that though a voluntary conveyance, made by a person not indebted at the time, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary, yet if it be shown to have been made with a fraudulent intent, or with a view to future debts, it may be successfully assailed by such subsequent creditors. *Sexton* vs. *Wheaton*, 8 *Wheaton's Rep.*, 229.

The deed impeached by the bill in this case is not simply a *post nuptial* settlement by the husband upon the wife, which would be good as to subsequent creditors, provided there was no fraudulent intent, or it was not made with a view to future debts. The deed here is supposed to be fraudulent and void as to creditors, both prior and subsequent, because of the trusts in it in favor of the grantor, and the authorities seem to me fully to establish the proposition for which they were cited by the complainant's counsel.

The case of *Taylor* vs. *Jones*, 2 *Atk.*, 600, and *Ford* vs. *Caldwell*, 3 *Hill, S. C. Rep.*, 242, seem to be conclusive against the validity of such deeds as the present, with reference to the subsequent as well as prior creditors.

Upon examining the deed in this case, it may be very fairly inferred that it comprehended all or nearly all the grantor's estate, real, personal, and mixed, and it appears to have been carefully drawn to retain to him the actual use and enjoyment of the property, without subjecting it to the payment of his debts. Certainly it is quite impossible to say that this deed was intended chiefly for the benefit of the wife, whose power and control over, and interest in the property, is so subordinate to that of the husband.

If a man may, after marriage, make provision for his wife and children, provided he does not impair the right of existing creditors, and a provision so made will be considered as founded upon a good consideration, and *bona fide* and impregnable against subsequent creditors, it by no means follows that he will be permitted, under cloak of providing for his wife and children, to place his property in a condition in which he shall have the substantial use and enjoyment of it during his life, with power to dispose of it by will or to direct its course after his death, that it shall descend to his heirs-at-law, and at the same time have it protected from the claims of those who may deal with, and trust him during his life.

The trusts of this deed, are 1st, for the use of the grantor and his wife during their joint lives, and the life of the survivor, with power to them jointly to dispose absolutely of the property during their joint lives; 2dly, in case the grantor should survive his wife in trust, to permit him to dispose of the property at his pleasure; and, 3dly, whether he survives her or not, in trust for such person or persons as he may appoint by his will, and in case of his failure, to make such testamentary appointment, then in trust for his heirs-at-law.

The whole interest, therefore, of the wife, is an interest in common with her husband during their joint lives, or for her own life, in case she should survive him. But no power of disposition is reserved to her independently of her husband, whilst to him after her death, such power in the fullest terms is given, either by deed or will, and in case he fails thus to dispose of the property, it descends to his heirs-at-law.

If appears to me that such a deed is clearly fraudulent and void, both with reference to pre-existing, and subsequent creditors.

It cannot be regarded as a voluntary conveyance, made by a husband in favor of his wife, which, if *bona fide*, will be permitted to stand as against subsequent creditors, but it is a conveyance made by a party for his own benefit, and although his wife was designed to participate with him to some extent, in the enjoyment of the property, the beneficial interest of the husband greatly preponderates over hers. It is emphatically a deed for the use of the grantor, which renders it void against all creditors, existing or subsequent.

The claims of the suing creditors are fully established by the pleadings and proofs, and it appears they have by their proceedings at law, placed themselves in a position to impeach the deed. A decree, therefore, will be signed, vacating this deed of the 2d of June, 1842, and appointing a trustee to make sale of the property embraced in it, which remains unsold, for the payment of the complainants, and the other creditors of the grantor, and directing the trustee to call them in as usual by advertisement. The equities of the creditors *inter se*, will be reserved for further order or decree. The complainants' counsel will prepare such a decree.

J. M. CAMPBELL, for Complainants.
C. H. PITTS, for Defendants.

BENJAMIN CRANE AND OTHERS
vs.
ANNE E. SEYMOUR AND OTHERS.
} SEPTEMBER TERM, 1850.

[ACT OF 1842, CH. 293, RELATING TO MARRIED WOMEN.]

WHEN a creditor proceeds under the 9th Section of the Act of 1842, ch. 293, to reach the property of a married woman, he must show that she earned it by her skill, industry, or personal labor, and must prove his claim according to the course of the attachment law, proceeding by way of attachment from the County Court.

The questions of fact and of law which may arise under this act, and the proceedings it authorizes, are intended and peculiarly fitted for decision by Courts of law aided by juries.

The question whether the property was earned by the married woman, and is liable for her debts, must be passed upon by a jury, and equity can only interfere to preserve the property from waste or destruction pending the litigation at law.

A peculiar and special mode of proceeding, to be pursued by creditors who attempt to reach the property of married women under this Act, is prescribed by the Act itself, and to this mode creditors are restricted.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

It appears by the record in this case, that on the 24th of October last, the complainant, Crane, sued out of Baltimore County Court the writ of attachment against the defendant, Anne E. Seymour, a married woman, founding his right so to proceed upon the 8th section of the Act of 1842, ch. 293; and that the writ so issued was returned by the sheriff, laid in the hands of Bardolph, and Boulding, and others, on the following day, being the 25th of the month.

The attachment was issued to recover the sum of $134 89, for sundry articles of merchandise sold and delivered by the plaintiff to Mrs. Seymour (according to the petition filed by

him in the County Court), as a *feme sole*, and for which, as insisted by the plaintiff, her property to a certain amount is responsible under said Act.

It further appears that on the said 25th of October, but before the attachment was levied, Anne E. Seymour and her husband, Edward Seymour, executed a bill of sale to the defendant Boulding, of the property proposed to be affected by the attachment, in trust, to pay the debts of the husband and wife, and that on the day following, they made to the same party a second bill of sale for the same purpose.

Under these circumstances, the present bill was filed on the equity side of Baltimore County Court by Crane, the attaching creditor, and Armstrong and Caton, in behalf of themselves and such other of the creditors of Anne E. Seymour as may make themselves parties by contributing to the expense of the suit, in which, after giving a detailed statement of the facts, and charging that the bills of sale were fraudulent, and designed to hinder, delay, and obstruct the complainant and the other creditors of Anne E. Seymour, and further charging that said Seymour and wife and Boulding are not, nor is either of them, so solvent and responsible as to make the property, consisting of merchandise, safe in their hands, and that said merchandise is in great danger of being wasted and improperly disposed of, in which event the creditors of Mrs. Seymour would be without remedy or recourse, they prayed the Court to interpose by injunction for its preservation, and that a receiver should be appointed to take possession of and sell the same.

The County Court upon this bill granted the injunction and appointed a receiver, and answers having been filed by the defendants, and motions made to dissolve the injunction and discharge the receiver, and the record being now in this Court under the provisions of the Act of Assembly in such case made and provided, and counsel having been heard in support of and in opposition to the motion, the proceedings have been duly considered.

The answer of the defendants, after denying the fraud

charged against them, and also denying that the property in question was the separate property of Mrs. Seymour, and affirming that the deed to Boulding was valid and effectual, as a provision for the equal and fair payment of all the creditors of Edward and Anne E. Seymour, expressly denies the allegation of the insolvency of the parties as charged in the bill, and that the property, by reason thereof, is insecure in their hands.

In the view which I have taken of this case, I do not consider it my duty to go over all the ground occupied in the argument, nor to express an opinion as to the interpretation of the Act of Assembly. Whether the particular section of that Act should receive a liberal or restricted construction remains to be decided hereafter, when a case shall arise properly presenting the question.

The question now is, whether the injunction granted by the County Court, and the order appointing a receiver, shall stand or be rescinded, and this, as it appears to me, does not necessarily or properly, as the case now stands, call for the interpretation of the statute.

This bill, as I conceive, cannot be supported as an appeal to the independent and peculiar jurisdiction of this Court, to vacate conveyances made in fraud of the rights of creditors. It addresses itself, not to the active and restorative authority of the Court, but to its protective power, and asks, and can only properly ask, that the property from which the creditors seek to be paid, shall be preserved until their legal rights to such payment can be adjudicated in the appropriate *forum*. Chancery, in a case like the present, can be only *ancillary* to the Courts of Law, and would, as I think, be going beyond its appropriate bounds, if it undertook to supersede the legal tribunal, and grant relief upon its own idea of the justice of the case, without waiting for the judgment of that tribunal.

It will be observed, that the section of the Act of Assembly referred to, does not make the earnings of a married woman liable in all the modes of proceedings, by which the property of persons under no disability may be reached by their credi-

tors. The proviso to the section is "That such money or property shall be liable for the payment of any claim or debt incurred by such married woman, and be liable to be proceeded against by attachment from the County Court, to compel such payment upon petition and proof of claim, according to the circumstances of each case, and according to the course of the attachment law."

When the creditor proceeds under this Act, to reach the property of a married woman, he must show that she earned it by her skill, industry, or personal labor, and he must prove his claim according to the course of the attachment law, proceeding by way of attachment from the County Court. The questions of fact, and the questions of law which may arise under this Act of Assembly, and the proceedings which it authorizes, are questions intended and peculiarly fitted for decision by Courts of Law, aided by juries.

In the case now under consideration, a great deal of evidence has been taken, and much of the argument has turned upon two questions of fact: *first*, whether the property in dispute was earned by Mrs. Seymour, and *secondly*, whether, conceding she did earn it, in a certain sense, it was so exclusively the fruit of her skill, industry, or personal labor, as to subject it to the demands of the parties who are seeking to be paid out of it. Now I think it very clear that these are questions of fact, not only peculiarly proper to be passed upon by a jury, but that it was the manifest intention of the Legislature that they should be so passed upon, and that this Court, in undertaking to decide them, would be unduly stretching its authority.

The Legislature, by this law, has conferred certain rights upon, and subjected married women, or the fruits of the industry and labor of married women, to the claims of creditors who can bring themselves within its provisions; but a peculiar and special mode of proceeding to be pursued by them, is to be marked out, and there can, it is thought, be no doubt that they are restricted to that mode. The proceeding is by way

of attachment from the County Court, upon petition and proof of claim, according to the course of the attachment law; and hence it clearly follows, that even in the County Court the creditor must fail of his object, if he attempts to recover his claim by any other remedy; and if this be so, it follows inevitably that this Court cannot be successfully resorted to.

It is not meant to be said (indeed, the contrary doctrine is believed to be maintainable), that in a proper case, this Court may not interpose to prevent the property charged to be liable to the claims of creditors, from waste or destruction, pending the litigation at law. And upon the allegation of the bill in the present case, showing the property to be in danger, the County Court, in my opinion, was fully justified in interfering for its preservation. But such interposition does not rest, upon any right in the Equity Court, to extend its aid primarily and in the exercise of an independent power, to adjudicate upon the rights of the parties. It is merely authorized when danger is shown, to put its hand upon the property to preserve it, until the tribunal authorized to adjudicate upon the rights of the parties shall have pronounced its judgment.

The attachment in this case was laid in the hands of Boulding and others, as garnishees, and if, upon the trial in the County Court, the plaintiff shall succeed in establishing his claim, and in showing that the property which was transferred to Boulding by the bills of sale, was liable to be proceeded against in this way, by a creditor of Mrs. Seymour, he must recover a judgment against Boulding, upon which he can make his money.

He will not, it is true, get a judgment of condemnation against the property, but as the case now presents itself, a judgment against the garnishee will be equally available to him, there being nothing in the record from which we have a right to suppose he is not fully responsible, the averment affecting his solvency being flatly contradicted by the answer, and the proof being entirely silent upon the subject.

These views dispose of the case so far as all the defendants are concerned, except McMullen, with regard to whom an

agreement has been filed, which, as between him and the plaintiffs, must govern the case.

[The Chancellor then passed an order dissolving the injunction, and discharging the receiver.]

WALLIS, for Complainants.
DULANY, for Defendants.

MARY RINGGOLD
vs.
VALENTINE BRYAN ET AL. } SEPTEMBER TERM, 1850.

[VENDOR'S LIEN—CHANCERY PRACTICE—EVIDENCE—NOTICE.]

A VENDEE who has sold the land, is a competent witness for his vendor in a proceeding by the latter against the purchaser to enforce the vendor's lien, to show that the purchaser had notice of such lien.

Whatever is sufficient to put a party upon inquiry, is good notice in equity.

The fact that complainant was in possession of part of the premises purchased, is sufficient to put the purchaser upon inquiry; and if he neglects to inform himself of the nature of complainant's rights, he must take the consequences of his neglect.

The averment that his vendor was at the time of the execution of the conveyance, seized or pretended to be seized, and was in possession of the premises conveyed, is indispensably necessary to a plea by a defendant that he is a *bona fide* purchaser *without notice.*

The complainant, who was the original vendor of the land, was in possession of part of it, when it was purchased from her vendee. HELD—That this was sufficient to put the purchaser upon inquiry as to all the terms and conditions of the contract between the complainant and her vendor, and he must be considered as affected with notice of them all.

The purchase-money attaches to the land in the hands of the vendee as a trust; and the heirs of the vendee, and all other parties claiming under him or them, with notice, are treated as in the same predicament.

Where the vendee has sold the land to a *bona fide* purchaser without notice, if the latter has not paid the purchase-money, the original vendor may proceed against the estate, or the purchase-money in his hands; for in

such a case, not having paid the purchase-money, he takes the land *cum onere*.

A judgment against the vendee gives to the judgment-creditor no estate in the land, but simply a lien upon it for the payment of his debt; and such lien being a general one, cannot affect or impair in any way the equitable lien of the vendor.

[The complainant, Mary Ringgold, and her husband William Ringgold, sold to the defendant William A. G. Hobbs, a tract of land and premises under the following contract, signed and sealed by the purchaser, and referred to in this cause as Exhibit B.

"I have purchased of William Ringgold and Mary Ringgold, his wife, the farm called Sportsmen's Hall, which was devised to the said Mary by her father, John Blake; and am to pay $8 an acre for said land, after deducting such parts thereof as have been heretofore sold. The whole purchase-money is to be paid by me equally among the children of the said Mary Ringgold, immediately after her decease, and upon their arrival at legal age: and in the case of the death of either, or any of said children without legal issue, then the portion of such deceased child to be equally divided among the survivors; and I am to reserve to myself a child's part of such purchase-money in right of my wife. The said purchase-money is not to bear interest during the life of the said Mary Ringgold; but I am to apply annually, during her life, a sum equivalent to such interest to such purposes as I may think most useful to her and her family. I am also to reserve for her use during her life the dwelling-house, kitchen, meat-house, poultry-house, and garden on said farm, with the privilege of getting firewood, of pasturing four head of cattle, and of raising any kind of poultry except turkeys. And if the said William Ringgold should survive his said wife, then I am to retain in my hands $1,000 of said purchase-money during his life, the interest of which is to be applied by me in such manner as I may think most to his advantage, the said sum to be distributed, as above-mentioned, after his death. And if I should refuse or neglect to secure to the said Mary Ringgold the an-

nual sum and the privileges above-mentioned, and the said William Ringgold the interest above-mentioned after the death of his wife, it is understood, and I hereby agree to pay to the children of the said Mary Ringgold at the times specified for their receiving the principal of the purchase-money, interest on the same from the 1st day of January last, and to forfeit such portion of said purchase-money as I should be entitled to in right of my wife. Witness my hand and seal this 2d day of February, in the year 1832."

On the same day the said William and Mary executed a deed marked Exhibit A, conveying the said land to the said Hobbs absolutely, in consideration, as expressed on the face of the deed, of $3,000 to them in hand paid by the grantee. Hobbs subsequently, on the 16th of December, 1837, mortgaged this land to the defendant, Valentine Bryan, to secure the latter as his security upon a note for $1,607, and an additional indebtedness of $653 48, due from the mortgagor to said Bryan. Afterwards, on the 14th of September, 1844, the said Bryan became the purchaser of this land at a sheriff's sale under a *fieri facias*, upon a judgment recovered against said Hobbs in Queen Anne's County Court, in favor of one H. C. Keys, and others.

After the death of the said William Ringgold, to wit, on the 30th of June, 1845, the complainant, his said wife, filed her bill in this case, in which, after stating the above facts, she charges that Hobbs has neglected and refused to pay the annual sum to her mentioned in said agreement, and that the same remains in arrear and unpaid for two years, amounting to the sum of $406 08, that he has become embarrassed, and has no means of paying the same, except by a sale of said land. That Bryan had full knowledge and notice of her claim and that of her children before the date of his mortgage, and at the time she and her husband executed the deed above-mentioned, he (Bryan) well knew the terms and conditions upon which it was made, he having in fact fixed the value of the land, and the sum of money which Hobbs was to pay for the same, and well knew how and to whom the purchase-money

was to be paid. The bill then prays for a decree to sell the land to pay complainant's claim, and for general relief.

The answer of Bryan admits the execution of Exhibit A, the mortgage of the property by Hobbs to him, and his purchase at sheriff's sale, as charged in the bill, but avers that he did not know at or about the time of the execution of Exhibit A, nor at any other time, until a short time before the sheriff's sale, of the existence or pretence of the claim thereto by complainant, of the covenant or agreement set forth in Exhibit B. That he believes Exhibit B was set up by complainant a short time before the sheriff's sale, and then claimed to have been executed at or about the time of the execution of Exhibit A. That he did not know and never heard, at or about the time of the execution of Exhibit A, that Hobbs was to pay an annual sum equal to the interest on the purchase-money, and the principal thereof to complainant's children after her death, nor did he know, nor was he afterwards ever informed, until a few months before the sheriff's sale, that the purchase-money had not been paid by Hobbs, according to the acknowledgment in Exhibit A. He admits that some months before the sale, complainant did allege that the purchase-money had not been paid by Hobbs, and some time after this conversation with complainant, he learned for the first time that she claimed any other consideration than that mentioned in Exhibit A. He admits that he heard, some short time after the execution of Exhibit A, rumors or reports of a consideration different from that therein expressed, but the consideration so reported to defendant was totally different from that contained in Exhibit B, and when this report reached him he inquired of a person who was present at the execution of the deed, if such a consideration as that reported was the true one, and was answered in the negative, and made no further inquiry on the subject. That on the faith and credit of his title to said land he had made large advances to Hobbs, and become security for him for large sums, and he charges that the suppression of said contract, if it were made, was in fraud of his creditors, and particularly of defendant. That the claim of such a covenant as

that contained in Exhibit B, was first made known to him only a short time before the sheriff's sale, which was long after he had made large advances, and incurred heavy responsibilities for said Hobbs. That notwithstanding his total ignorance of any such agreement as that set up in Exhibit B, up to the time stated above, yet regarding the land to be worth more money than the aggregate of all the liens created by Hobbs which bind it, he has been always willing and ready to secure complainant, since his said purchase, an annuity for life equal to the interest upon the price of the whole land at eight dollars per acre, and the principal to her children after her death, except the part that would belong to Hobbs, provided he has made to him a good, quiet, and sufficient title to the land, and before the filing of this bill, he made this offer to a friend of the complainant, who in her behalf applied to him to settle this claim. That notwithstanding complainant is seeking the relief prayed in her bill, she has been holding possession of a part of the premises, and deforcing him of the possession thereof. That he had no knowledge of any arrearages for annuity or rent due by Hobbs to complainant at the time of the sheriff's sale, and at that time no notice whatever was given thereof.

The purport of the proof taken in the case sufficiently appears from the opinion of the Chancellor.]

THE CHANCELLOR:

Upon carefully reading and considering the pleadings and proofs in this case, I am of opinion that the equitable lien of the vendor, for the unpaid purchase-money, attaches to the land sold and conveyed by the complainant to William A. G. Hobbs, on the 2d of February, 1832, and subsequently mortgaged by Hobbs to the defendant, Valentine Bryan. The answer of this defendant admits that prior to the sale to him by the sheriff, in September, 1844, he was informed by the complainant that the purchase-money remained unpaid, and that afterward, and as it appears also, prior to his purchase from the sheriff, he learned that the complainant claimed that she was entitled to other considerations besides the money consideration to be paid her by Hobbs.

The answer, however, denies, though not in very precise and explicit terms, that the defendant knew that the purchase-money had not been paid by Hobbs at the date of the mortgage by the latter to him. But this denial, assuming it to be positive, is, I think, overcome by the evidence, which shows very clearly that Mr. Bryan did know of such non-payment, and was fully aware that his mortgages were subordinate to the claim of the vendor for the purchase-money. The depositions of Grason and Hobbs are conclusive upon this point, and though the competency of the latter has been excepted to upon the ground of interest, I do not see upon what principle his deposition can be excluded. The ground of the objection is that the tendency of his testimony is to make the defendant, Bryan, primarily responsible to the complainant and himself only in a secondary degree. But the object of this proceeding is not to make Bryan personally responsible at all, and as against him personally the complainant can have no decree. The object of the bill is to charge the land with the lien of the vendor, and though this might relieve the witness from the claim of the complainant for the purchase-money, it would leave him exposed to the prosecution of Bryan for the moneys due him, to secure the payment of which the land was mortgaged.

But, conceding the objection to the competency of the witness is well taken, there is surely enough left to subject the defendant Bryan to the consequences of notice. That there were awakening circumstances in the case, sufficient to put him upon an inquiry, is undeniable, and as remarked by the Court of Appeals in *Magruder* vs. *Peter*, 11 *G. & J.*, 243, "whatever is sufficient to put a party upon inquiry, is good notice in equity." In this case, a possession of a part of the premises was in the complainant, and that was a circumstance to put the purchaser upon the inquiry, and if he neglected to inform himself of the nature of her rights, he must take the consequences of his neglect. *Baynard* vs. *Norris et al.*, 5 *Gill*, 468, which authority also proves that the answer in this case omits an averment, indispensably necessary to the validity of

a plea, that the defendant is a *bona fide* purchaser without notice, to wit, "that the grantor was, at the time of the execution of the mortgage by him to the defendant, seized, or pretended to be seized, and was possessed of the premises conveyed."

But, so far as regards the purchase-money of this property, it cannot be material to determine whether, but for the defendant's offer, it would not be liable, since the answer itself contains an expression of the defendant's willingness to pay it, in precise accordance with the terms of the contract, as set out in the complainant's Exhibit B. The language of this part of the answer, is, "that notwithstanding his total ignorance of any such agreement between the said Hobbs and the complainant, up to the time stated above, yet that the defendant, regarding the said land to be worth more money than the aggregate of all the liens created by said Hobbs, which bind the said land, has been always willing and ready to secure to the complainant (since his said purchase) an annuity for life, equal to the interest upon the price of the whole land, at the rate of eight dollars per acre, and the principal to her children after her death, except the part which would belong to the said Hobbs, provided he has made to him, the said defendant, a good, quiet, and sufficient title to the said land and premises."

The real controversy, therefore, in this case is not with regard to the purchase-money, but has respect to certain privileges which, by the contract between the complainant and Hobbs, executed on the same day with her deed to him, were secured to her during her life. These privileges consisted of her right to the use of the dwelling-house, &c., on the land, and certain other rights in said contract expressed.

Now the circumstance which has been mentioned as sufficient to put the defendant on the inquiry, with regard to the payment of the purchase-money, made it equally obligatory upon him to inquire into all the terms and conditions of the contract, and he must be considered as affected with notice of them all. Nay, the answer itself shows conclusively that rumors were in circulation, and had reached the ears of the

defendant, that the moneyed consideration mentioned in the deed from the complainant to Hobbs was not the only one, and no sufficient reason has been assigned for the defendant's omission to make inquiry in a quarter from whence correct information could have been obtained. I should, therefore, strongly incline to think that all the consequences of notice of these additional considerations would attach to the defendant, even if the proof of actual notice was less direct and positive. But when the evidence of Grason and Hobbs is examined, by which it is shown that the defendant personally knew all the terms of the contract between the latter and the complainant, it is, as it seems to me, impossible that the defendant can free himself, or the property purchased by him, from all the consequences resulting from such knowledge.

The defence relied upon in the argument, founded upon the purchase by the defendant from the sheriff under Key's judgment, cannot be allowed to prevail. At that time, and for some short time before, according to the distinct admission of the answer, the defendant knew of these additional considerations, and therefore he cannot complain that he bought the property in ignorance of their existence, nor does he do so, the defence set up by him being that the suppression of them was a fraud upon the creditors of Hobbs, and particularly upon the defendant, who was acting as his friend, and becoming involved for him for large amounts, and making him considerable advances in money.

The imputation that fraud in fact was perpetrated or contemplated by the complainant, in not expressing the full terms of her contract with Hobbs upon the face of her deed to him, is fully repelled by the evidence of Grason, who shows why these terms were omitted, and that it certainly was not with any design to defraud any one. In the hands of Hobbs, the purchaser from the complainant, the land was unquestionably bound for the purchase-money, notwithstanding the execution of her deed to him. The purchase-money attached to the property in the hands of the vendee as a trust, and the heirs of the vendee and all other persons claiming under him or them

with notice, are treated as in the same predicament. 2 *Story's Eq.*, *sec.* 1217, 1218, 1219. And where the vendee has sold the estate to a *bona fide* purchaser without notice, if the purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase-money, in the hands of such purchaser, for satisfaction; for in such a case the latter, not having paid the purchase-money, takes the land *cum onere*. 2 *Story's Eq.*, *sec.* 1232.

The judgment in favor of Key gave him no estate in the land, but simply a lien on it for the payment of the debt, and such lien, being a general one, could not affect or impair in any way the equitable lien of the vendor for the unpaid purchase-money. *Hampson* vs. *Edelen*, 2 *H. & J.*, 64; *Repp et al.* vs. *Repp et al.*, 12 *G. & J.*, 341. I do not, therefore, think that the defendant, Valentine Bryan, can protect himself under his purchase at the sheriff's sale upon the execution of Key's judgment.

But although I am of opinion that the complainant is entitled to relief, the case is not now in a condition for a final decree. The bill claims that the annuity stipulated to be paid by Hobbs is in arrear and unpaid, but there is nothing in the record to show how much is in arrear, nor is there any satisfactory evidence of the value of the privileges mentioned in the contract. These privileges are not claimed by the bill in the specific prayer for relief, but the contract by which they were secured to the complainant, is filed as an exhibit, and proved by the evidence, and there being no exception to the sufficiency of the averments of the bill, I am of opinion that under the general prayer, relief may be afforded in respect of them.

I shall, therefore, send the case to the Auditor, with directions to take an account of the amount due for the purchase-money and the annuity, being the interest thereon, and also the value of the privileges specified in the agreement, to the end that such a decree may be hereafter passed, as the justice of the case requires.

McLean and Otho Scott, for Complainants.

Wm. A. Spencer, for Respondents.

WILLIAM BOONE AND OTHERS
vs.
SAMUEL BOONE AND OTHERS.

July Term, 1850.

[PARTITION.]

This Court will not sustain a bill for a partition, where the title of the complainant is denied, or not clearly established by the evidence; but will retain it for a reasonable time, to give him an opportunity to make out his title at law.

The fact that the defendant relies upon lapse of time, and limitations founded on long possession, is a strong reason for leaving the complainant to make out his title at law.

[The facts of the case are sufficiently stated in the opinion.]

The Chancellor:

This is a bill for a partition, and the title of the plaintiffs being denied, and not, in my opinion, established with that degree of conclusiveness which is required in such cases; the relief prayed cannot be granted, though the bill will be retained for a reasonable time, to give the plaintiffs an opportunity to make out their title at law.

In the case of *Wilkin* vs. *Wilkin*, 1 *Johns. Ch. Rep.*, 111, the Chancellor said, "The Court does not sustain a bill for a partition, unless the title be clear." And in *Cartwright* vs. *Pultney*, 2 *Atk.*, 380, Lord Hardwicke observed, that "where there are suspicious circumstances in the plaintiff's title, the Court will leave him to law."

As remarked by Chancellor Kent, in *Wilkin* vs. *Wilkin*, it appears to be the course of the Court, when the question of title on a bill for partition was in issue, to give the plaintiff a reasonable opportunity to try his title at law, and in the mean time to preserve the bill. In this case it is too clear for controversy, that the title of the plaintiff is involved in doubt and difficulties; that it is surrounded by suspicious circumstances,

and depends upon some questions of a strictly legal character, which render it eminently proper that it should be submitted to examination in a Court of Law. One of these questions is, whether the defendants are not protected by lapse of time, and the statute of limitations relied upon, in the answer of some of them rendering it still more essential that the plaintiffs should make out their title at law.

In the case of *Wells et ux* vs. *Beall*, 2 *G. & J.*, 468, this course was pursued by the Court of Appeals, upon a bill for dower, when the husband's title to the land was controverted, the bill being retained, and a reasonable time given, to enable the complainant to establish her title at law.

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[The Chancellor then passed an order, allowing complainants the period of twelve months, to establish their title at law, and in the mean time retaining the bill, with leave to any of the parties at any time after the expiration of said twelve months, to move for such further order and decree as the case may require.

In the case of *Saffels and Wells* vs. *Wells and others*, decided at the same term, involving the same question, the Chancellor delivered the following opinion.]

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THE CHANCELLOR:

I had occasion, a few days ago, in the case of *Boone* vs. *Boone, et al.*, to consider the question presented by the pleadings in this case, and came then to the conclusion, that this Court would not sustain a bill for a partition, where the title of the complainant was denied, or not clearly established by the evidence. Following, however, the authority of the Chancellor in *Wilkin* vs. *Wilkin*, 1 *Johns. Ch. Rep.*, 111, I deemed it proper to retain the bill for a reasonable time, to give the complainant an opportunity to make out his title at law, if he could do so. And in this respect, also, pursuing the course adopted by the Court of Appeals in *Wells and wife* vs. *Beall*, 2 *G. & J.*, 468, where, in a bill for dower, the title of the husband being controverted, the cause was directed to be

retained for a reasonable time, that the right be established at law.

In this case, the title of the plaintiffs to any portion of the land of which a partition is prayed, is most emphatically denied by the defendant, William Wells, of George, and there is certainly nothing in the record clearly establishing it, in opposition to the answer. The case, therefore, comes directly within the precedent already set, and must be disposed of accordingly. And there is this additional and strong reason for leaving the complainants here to make out their title at law, that the defendant, Wells, relies upon lapse of time, and limitations founded upon long possession. This consideration, as observed by Chancellor Kent, renders it still more proper that the complainants should be required to establish their title at law, before they come into Chancery for a partition.

[The Chancellor then passed an order similar to that in the previous case.]

DAVID CARLISLE
vs.
HENRY STEVENSON.

DECEMBER TERM, 1850.

[INJUNCTION TO PREVENT TRESPASS OR NUISANCE—JURISDICTION.]

THIS Court has jurisdiction to compel a defendant, by means of an injunction specially worded, to do a substantive act, whether such injunction be merely ancillary to the relief prayed by the bill or the ultimate object of the suit.

Unless the trespass goes to the destruction of the inheritance, or the mischief is irreparable, or an injunction is necessary to suppress multiplicity of suits and oppressive litigation, equity has no authority to interfere by injunction.

The mere allegation that irremediable injury will result to the complainant, unless protection is extended to him, is not sufficient; the facts must be

stated, that the Court may see that the apprehensions of irreparable mischief are well founded.

The fact that the injury complained of is one that may be continued, does not prove that it is not susceptible of adequate compensation in damages by an action at law.

The permitting a race or ditch for conducting water to remain out of repair, so that the water filtrates through the bank, thereby flooding and injuring the meadow of the complainant, is not such an injury as will authorize the interference of equity by way of injunction.

If actions had been brought at law and damages recovered, and defendant still persisted in permitting the ditch to remain in a defective condition, equity would then interfere by injunction, because it would be shown that the Courts of Law were inadequate to afford relief.

If the race was in as good condition as it was during the life of the person under whom both parties claim, or if the injury complained of was caused by the act of complainant himself, he could not have redress in any Court upon any principle.

[The bill in this case was filed upon the equity side of Baltimore County Court, and alleges that Samuel Owings, by his will, devised his dwelling and plantation, lying across Owings's Valley, in Baltimore County, in equal portions to his daughters, Deborah, Hannah, and Urath, giving the lower or eastern portion, on which was his house, barn, saw-mill, and other improvements, to Deborah. That these daughters, and the other heirs-at-law of the said Samuel, united in an amicable partition of his estate, and conveyed to each other their respective portions of it. That by this partition Deborah received the farm lying east, embracing the dwelling, mill, and barn, as the testator desired. Hannah, then a widow, named Hannah Ballard, received the farm lying west and westwardly, and Urath the farm lying highest up the Valley, and farthest west. That Deborah married the defendant, Henry Stevenson, with whom she now lives on her said farm. That Urath intermarried with complainant, who, in virtue thereof, became possessed of her said farm, and in 1840 he purchased the intervening farm of Hannah. That these three farms, extending across Owings's Valley, each contain many acres of valuable meadow land, and are all intersected by the stream of "Jones's Falls." That about twenty years before his death, said Samuel Owings having

erected a saw-mill on his lower place far to the west of said stream, and his dwelling and barn-yard also being situated to the north, and aloof from said stream, and several of his lower meadows and fields being thus located, and requiring occasional watering by artificial means, he stopped the said stream at the western verge of what is now complainant's upper farm, and, by a race or ditch of proper depth, led off the water with the aid of a partial dam across the stream, to the north end, by a very tortuou track, at varying distances from the bed of the stream, and conducted it through complainant's two farms, with a destination to the mill and dry fields, and dwelling and barn-yard aforesaid. That said Samuel, in his lifetime, operated said mill, and irrigated his lower fields, as occasion required, with the waters through this race. That complainant possesses twenty or thirty acres of valuable meadow land below and south of this race, and between its track and the bed of said stream, which, from its descending and depressed condition, is liable to be overflowed, and its crop drowned by the waters escaping and making therefrom, unless its lower or southern embankments are kept in repair, its bed cleared out, and its current kept up. That two suits at law were instituted in Baltimore County Court, in which complainant and said Stevenson were alternately plaintiff and defendant, the object of both of which was to ascertain and settle the respective rights and privileges of himself and defendant in relation to said race and its waters, and the mode of conducting them through their meadows, and it was adjudged, after much investigation and argument, that by the true construction of the will of said Samuel Owings, said Stevenson had a right to the use of the water conveyed in the race, for the purposes for which the testator had used it, and was bound so to conduct it through complainant's lands in the channel of said race, and with such careful preservation of the grade and proper bed and embankments thereof, as that complainant should in no way be injured by leaks or floodings therefrom, and that it was his right and duty to enter upon complainant's lands with his servants and teams and carts, for the purpose of clearing

out the bed, and preserving the grade and current, and repairing the defects in the embankments of said race, so that complainant's crops might and should be preserved and protected from any manner of injury, in consequence of the waters becoming stagnant in or escaping from the banks thereof.

The bill then charges that said Stevenson, while he exercises his right of entering on complainant's lands in a capricious and wanton manner, and doing from time to time imperfect repairs, has allowed the bed of said race, in its lower sections on complainant's land, to be filled up, its lower embankments to fall into decay, the current of the stream to be thereby checked, and its waters to be backed and forced out at various places on complainant's meadows, ruining them and drowning his crops, to his incalculable injury and detriment. That he has been almost constantly suffering for several years past, and is now suffering in his property from the injuries and aggressions aforesaid, notwithstanding the said repeated suits at law, and the judgments therein; that in the course of the last summer he has particularly suffered from the flooding and drowning of his crops and lands, and is yet thus suffering in consequence of the perforations and decay of the embankments of said race, and the filling and choking up of its bed, and the total omission, neglect, and refusal of said Stevenson to repair and correct the same. That unless he procures the interposition of this Court, he must be driven to multiplied and endless, and perhaps fruitless, suits at law, and that he certainly is and must be deprived of the proper and useful enjoyment of his freehold, and subjected to great and permanent injury in his property by the said omissions of duty and aggressions of said Stevenson. He therefore prays for a writ of injunction directed to said Stevenson, commanding him "no longer to permit to be and remain out of repair, the banks of the race or ditch conducting the water of 'Jones's Falls' through the farms of your orator in Baltimore County aforesaid, to the mill and dwelling-house of the said Stevenson, so as by remaining ungraded and cleared out, to permit the waters of said race or ditch to flood or weep upon the said meadow lands of your

orator, or to stagnate in said race or ditch, or in any other way drown or injure the meadows of your orator."

The injunction was granted as prayed in the words above quoted from the bill. The answer objects—1st, to the jurisdiction of the Court to grant the relief prayed upon the case made by the bill; 2d, that the bill does not present a case for an injunction, either as a final or interlocutory remedy; and 3d, that the wives of the complainant and defendant should have been made parties to the suit. It then avers that he has kept the race clean and the banks in repair, and that the filling up which takes place in the bed of it, except so far as freshets may occasion it, is to be ascribed to the manner in which it is used by the complainant himself, who has made pens for his cattle in the bed of it, and by other means caused the channel to be choked up. And that the race and its banks are in as good or better order than they were during the lifetime of the said Samuel Owings, and he denies that any losses have been sustained by the complainant, through any negligence or omission of duty on his part in regard to the bed and banks of said race.

The nature of the proof taken in the cause sufficiently appears from the opinion of the Chancellor.]

THE CHANCELLOR:

It cannot be denied, I think, that the injunction which issued upon the bill in this case, was framed upon the principle of *Lane* vs. *Newdigate*, 10 *Ves.*, 193; and however attenuated may be the distinction between the rule then, if not before established, and the former doctrine of the Court with regard to the appropriate office of an injunction when not issued as a judicial writ to enforce a decree, the principle of that case seems never to have been repudiated. It may, therefore, in my opinion, be assumed that this Court has jurisdiction to compel a defendant, by means of an injunction specially worded, to do a substantive act; and I am not able to see why if this may be done in the first instance, and upon an *ex parte* application, it may not also be done in a proper case by the final

decree. The difficulties suggested by the defendant's counsel with regard to enforcing the final decree, equally apply to an injunction issued at an earlier stage of the cause. In every case, if an attachment be applied for and issued for a violation of an injunction, the inquiry is, has the defendant disobeyed the order of the Court? and I cannot perceive why there will not be as much embarrassment in determining this question if the injunction be issued in the commencement as at the conclusion of the cause. The argument is, that the defendant ought to be informed by the decree of the Court what he is to do or to leave undone, and that unless he is so informed upon the return of the attachment, the question will be presented whether he has done that which was necessary to be done to prevent the results against which the complainant asks the aid of the Court. But will not this precise question come up in the case of an injunction issued at an earlier stage of the cause? and if so, and it be conceded or shown that an injunction like the present may issue at such earlier stage, there would seem to be no reason why it should not issue at its conclusion. I therefore think, whether the injunction be merely auxiliary to the relief prayed by the bill, or be, as it is in this case, the ultimate object of the suit, the form in which it was asked in this case is no valid objection to it.

But though I think there is no valid objection to the form in which the aid of the Court is invoked, I entertain strong doubts upon the question of jurisdiction. The case appears to me in its essential features not distinguishable from that of *Amelung* vs. *Seekamp*, 9 *G. & J.*, 468, and I have not been able to discover how it can be brought within any of the exceptions to the general rule then announced by the Court of Appeals. It is not, I think, shown here that the complainant may not "obtain perfect pecuniary compensation in the ordinary course of law;" "that it is a case of trespass going to the destruction of the inheritance, or that the mischief is remediless." I am not satisfied that the mischief complained of "is irreparable," or that the interference of the Court, by way of injunction, is necessary "to suppress a multiplicity of suits and

oppressive litigation." And unless this appears, there is no authority in this Court to grant an injunction.

The mere allegation that irreparable injury will result to the complainant unless protection is extended to him, is not sufficient; the facts must be stated, that the Court may see that the apprehensions of irreparable mischief are well founded. It is true that the mischief complained of here is one that may be continued, but that was likewise the character of the act in *Amelung* vs. *Seekamp*, which was for obstructing the complainant in the enjoyment of a private right of way over the lands of the defendant to the public road, but that, say the Court of Appeals, by no means proves that the injury was not susceptible of adequate compensation in damages, by an action at law.

In the case of *Lucas* vs. *McBlair*, 12 *G. & J.*, 1, relied upon by complainant's solicitor, it was manifest that infinite difficulty existed in obtaining adequate redress at law, and that without the interposition of Chancery an endless series of actions would have been necessary. The object of the bill in that case was to prevent the Commissioners of Lotteries from licensing, and the persons licensed by them, from selling lottery tickets, in opposition to what was adjudged to be an exclusive right in the complainants; and it was therefore clear, that unless the thing was forbidden, litigation interminable, oppressive, and unsatisfactory, would be the result. And the Court of Appeals expressly put their decision upon that ground.

But in this case, the act complained of is permitting a race, or ditch for conducting water, to remain out of repair, by which, it is charged, that the water filtrates through the bank, thereby flooding and injuring the meadow of the complainant. Now assuming that it is the duty of the defendant to keep the race in repair (and this is not controverted), why cannot adequate redress be had in an action at law? Because, it is said, every day the race continues out of repair a fresh injury is done, and a new right of action accrues. But was not this also the case in *Amelung* vs. *Seekamp?* Every day the ob-

struction remained in the road was a fresh injury, and justified a new action, and yet the Court in that case refused the injunction, upon the ground that adequate redress for the injury might be had at law.

If, to be sure, actions had been brought at law by this complainant, and damages recovered, and the defendant still persisted in permitting the race to remain in a defective condition, the Court would then be authorized to interfere by injunction, because it would then be shown (the right of the plaintiff being established), that the Court of Law was inadequate to afford him relief. No such case is, however, exhibited by the bill. It does, to be sure, allege that suits at law had been instituted, but it also appears that in these suits the parties were reciprocally plaintiff and defendant; and without being informed of the nature and object of these suits, or the result of them, we are merely told what was the construction put by the Court upon the will of the late Samuel Owings, respecting the rights and privileges of the parties, founded upon the will. It is certainly not stated or shown anywhere in these proceedings that the present complainant had repeatedly appealed to the legal tribunals for redress, and that although his right thereto was established, their power was not sufficient to afford him adequate relief.

But considering this view to be untenable, and assuming that a Court of Equity is competent, and ought to exercise its extraordinary jurisdiction upon the facts charged by this bill, supposing them to be admitted, or established by the evidence, I should yet very much question the propriety of doing so in the present case, and this upon two grounds.

First, because I am far from being satisfied that the race is not in as good, or better, condition now than it was during the life of Samuel Owings, under whom both parties claim; and *secondly*, because there are certainly plausible reasons disclosed by the evidence for believing that the injury complained of is, to some extent at least, caused by the acts of the complainant himself. And if either ground can be maintained upon the proof, there would seem to be no injury for which repara-

tion can be had in any Court, or upon any principle; for it cannot be asserted that the complainant is entitled to be in a better condition than him under whom he claims, or that he has a right to ask redress for a self-inflicted injury.

I do not deem it necessary to refer in detail to the evidence upon which my impressions upon these questions is founded, and will merely say that the conclusion to which I am strongly inclined to come, cannot well be avoided upon an examination of the testimony of William L. Owings, who, from his relation to the parties and peculiar opportunities of observation, is particularly qualified to speak upon the subject. At all events, it appears to me, looking to the whole of the evidence, that it would be a stretch of authority in this Court to undertake to decide these questions of fact, eminently proper to be passed upon by a jury. It surely would be better, before this Court exerts its power in this form, holding out what has been termed the menacing process of an injunction, to have these controverted questions settled at law, for unless this is done, the parties cannot have the benefit of that more satisfactory examination of facts which the intervention of the jury in such cases seldom fails to afford.

I am, therefore, of opinion, that the plaintiff has not shown himself entitled to the relief he seeks, and his bill must consequently be dismissed.

J. J. Speed and John Nelson, for Complainant.

J. M. Campbell, for Defendant.

THE BANK OF WESTMINSTER
vs.
WILLIAM PINKNEY WHYTE, PERMANENT TRUSTEE OF GEORGE SUTER.

WILLIAM PINKNEY WHYTE, PERMANENT TRUSTEE OF GEORGE SUTER
vs.
JOHN FISHER ET AL.

March Term, 1850.

[ABSOLUTE CONVEYANCE DECLARED A MORTGAGE—INSOLVENT SYSTEM.]

No matter how absolute a conveyance may be on its face, if the intention is to take a security for a subsisting debt, or for money lent, the transaction will be regarded as a mortgage, and treated as such.

Though the defeasance was by an agreement resting in parol, still as between the parties, the deed, though absolute on its face, will be considered a mortgage.

Parol evidence is admissible to show that an absolute conveyance was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud or mistake.

But unless accident, fraud, or mistake can be shown, or in cases of trusts, parol evidence cannot either at law or in equity be admitted to contradict, add to, or vary the terms of a will, deed, or other instrument.

In this case, the answer of the grantee confessing and admitting that a security merely was intended to be taken for a subsisting debt, the conveyance, though absolute on its face, was declared to be a mortgage.

It is the right and duty of the trustee in insolvency to sell the property of the applicant encumbered by mortgages, and pay off the liens and incumbrances thereon.

Where the insolvent has made an absolute transfer of property in the nature of a trust to secure the payment of the money due by him to the grantee, such property must be administered by his trustee in insolvency.

The design of the insolvent laws was to secure a prompt, single, and harmonious administration of the estate of the insolvent, which could only be effected by bringing all the parties interested before one and the same tribunal.

[William Pinkney Whyte, as permanent trustee of George Suter, an insolvent debtor, who applied for the benefit of the insolvent laws on the 13th of March, 1846, filed his bill on the 10th of May, 1847, to set aside a certain judgment confessed

by said Suter to the Bank of Westminster, on the 26th of November, 1845, for $9250, as a fraud upon the insolvent system. This bill specially interrogates Fisher, the cashier of the Bank, whether $3,000, part of said judgment, was not lent upon the security of three stalls in different markets in the City of Baltimore, owned at the date thereof by said Suter. Fisher in answer to this bill, states, that in November, 1845, Suter was indebted to the Bank in the sum of $6,000, then due and unpaid, on various notes drawn and endorsed by him; and on the 26th of that month, said Bank having on that day advanced him $3,000, he confessed a judgment to the Bank for $9,000, and executed a bill of sale or transfer of his licenses for the market-stalls mentioned in the bill; that said sum of $3,000 was not lent specifically upon the security of these stalls, but on the joint security of said stalls and other property, which at the time was believed by respondent to be bound by said judgment, the object of the Bank and of Suter being, as understood by respondent, to secure not only the money then advanced, but the debt previously due said Bank. That upon the judgment so confessed, executions were issued and the property sold; and since said sale, David Stewart, Esq., claims to be the owner of the personal property so sold, under a deed executed by Suter on the 29th of January, 1846, conveying to him all his property, real, personal, and mixed, in trust for the payment of the grantor's debts, &c.; and said Stewart has instituted suit against the sheriff, who had been indemnified by the Bank to recover the same, which suit is now pending. (The deed to Stewart and the suit here referred to, will be found reported in the noted case of *Kettlewell* vs. *Stewart*, 9 *Gill*, 472.)

Afterwards, on the 14th of July, 1847, the Bank filed its bill for an injunction restraining the trustee in insolvency from selling the stalls assigned to its cashier Fisher, as above stated. This bill claims that this assignment was *bona fide* made, and not in contemplation of insolvency; and that thereby the Bank became invested with a full title to said stalls, encumbered only with a trust that the proceeds thereof, when

sold, should be applied as a credit upon the judgment aforesaid, in part payment of which it was received. The injunction was granted as prayed. Whyte, the insolvent trustee, in his answer to this bill, admits that the Bank became nominally invested with a full title to said stalls; but in equity and good conscience, was entitled to the same only as a security, by way of mortgage for the debt due by Suter to the Bank, of $3,000; and that the same passed to said Fisher as the agent of the Bank, encumbered with the trust that the debt or loan aforesaid of $3,000 should be secured thereby, and that all beyond that debt should enure to the benefit of Suter and his assigns; and that respondent, as his permanent trustee, has the right to administer the same in insolvency.

Afterwards, on the 21st of October, 1848, Whyte filed his bill for an injunction restraining Fisher and his agents, or assigns, from interfering in any way with said stalls or the possession thereof.

This injunction was granted, and the two causes were argued together, upon motions to dissolve the injunctions granted in each.]

THE CHANCELLOR:

These cases have been argued together, and are so connected, as, in the view of the counsel and the Court, to constitute but one suit.

The pecuniary interest involved is inconsiderable, but the questions which the cases present, are not unimportant. The general rule is too firmly established to be questioned, that no matter how absolute a conveyance may be on its face, if the intention is to take a security for a subsisting debt, or for money lent, the transaction will be regarded as a mortgage, and will be treated as such. *Hicks* vs. *Hicks*, 5 *Gill. & Johns.*, 75; *Dougherty* vs. *McColgan*, 6 *ibid*, 275. And though the defeasance was by an agreement resting in parol, still as between the parties, the deed, though absolute on its face, will be considered a mortgage, for parol evidence is admissible to show that an absolute conveyance was intended as a mortgage,

and the defeasance was omitted or destroyed by fraud or mistake. 2 *Kent's Com.*, 142, 143; *Henderson* vs. *Mayhew et al.*, 2 *Gill*, 393. But it is likewise undeniably true, that unless accident, fraud, or mistake can be shown, or in case of trusts, parol evidence cannot, either at law or in equity, "be admitted, to contradict, add to, or vary the terms of a will, deed, or other instrument." *Bend* vs. *The Susquehanna Bridge Co.*, 6 *H. & J.*, 128; *Watkins* vs. *Stockett*, *ibid*, 435.

In this case, the transfer of the three stalls is absolute and unconditional, and if there was nothing in the answer of Mr. Fisher, to whom the transfers were made, and who acted as the agent of the Bank, in the negotiation with Suter, from which it could be fairly inferred that the object was to take a security for money loaned, or to be loaned, it would fall within the general rule, and the transfer could not be qualified by the introduction of parol evidence, neither fraud nor mistake being alleged. But looking to the pleadings in the case, and especially to the answer of Fisher to the bill filed by Whyte, as the permanent trustee of Suter, to set aside the transfer as fraudulent, in view of the insolvent laws, which answer is invoked in these causes, and has been read without objection; and there can, I think be no doubt that the transfer of the stalls was taken as security for the repayment of money due the Bank, and not absolutely by way of purchase. The language of the answer is, "That the said sum of $3,000 was not *lent* specifically upon the security of the three stalls in different markets in the City of Baltimore, but on the joint security of said stalls, and other property of said Suter, which, at the time, was believed by this respondent to be bound by said judgment, the object of the Bank and Suter being, as understood by this respondent, *to secure* not only the money then advanced, but the debt previously due the Bank."

It therefore clearly appears, that the transfer of the stalls was taken as security for a debt, and whether to secure the specific sum of $3,000 loaned Suter at that time, or the entire debt of $9,000, for which the judgment was confessed, still the intention of the parties was surely to give and to take a security for a debt, and consequently the transaction must be

treated accordingly, that is, the transfer must be regarded as a mortgage or pledge to secure the payment of a debt, and not as passing the absolute title to the creditor.

The position that this was the intention of the parties, derives powerful support from the fact that the sum of $3,000 advanced at the time of the transfer, was included in the judgment confessed by Suter. Indeed, I do not understand it to be contended by the counsel of the Bank, that these three stalls were purchased by it for the sum of $3,000, because, if so, no conceivable reason could be assigned for including that sum in the judgment. His argument is, that the transfer was absolute, and that the Bank was to be at liberty to sell, and apply the proceeds of the sales to the extinguishment, so far as they would go, of the entire debt of $9,000, for which the judgment was rendered. If that was the character of the transaction, that is, if the stalls in the hands of the Bank, or its agent, Mr. Fisher, were affected with a trust to sell and apply the proceeds to the payment of the debt, still I should think that in the eye of a Court of Equity, the transfer would be regarded as a mortgage, being a mere security for the debt, and not an indefeasible transfer of the title. My opinion then, is, that this transfer of these stalls, though absolute in terms, must be treated as a security merely, and be subject to the consideration governing such transactions. And this conclusion is arrived at, without trenching upon the principle that parol evidence in the absence of fraud or mistake, is inadmissible to vary or contradict the clear import of a written instrument; but upon the confessions and statements of the answers themselves, which, in my opinion, prove clearly that a security merely was intended to be taken, and if so, it follows that however absolute the form of the instrument, it will be dealt with as a mortgage.

The remaining question has reference to the right of the insolvent trustee of Suter to sell this property, and administer the proceeds of the sale under the control of the Court, by which he was appointed. And this depends upon the true construction of the 5th and 7th sections of the Act of 1805, ch. 110. It is conceded, and indeed could not be disputed,

since the decision of the case of *Alexander* vs. *Ghiselin et al.*, 5 *Gill*, 138, that if the transfer of this property is to be regarded as a mortgage or a pledge for the security of a debt, that it would be the right and the duty of the insolvent trustee to sell it, and pay off the liens and incumbrances thereon, the opinion of the Court of Appeals in that case being explicit to that effect. But it is urged that the transfer here, though made to secure a debt, is in the nature of a trust, and that the insolvent trustee has no authority to interfere with the trustee selected by the convention of the parties, whose right it is to proceed in the discharge of his duty, undisturbed by any such interference. It appears to me, however, that assuming this transaction to be such as the counsel for the Bank has characterized it, that is, that the property in question, though transferred to Mr. Fisher absolutely, was nevertheless affected with, and to be regarded as subject to a trust, for the payment of the money due from Suter to the Bank, and that parol evidence is admissible for the purpose of showing the trust, still it seems clearly to come within the scope of the principles settled by the Appellate Court, in the case referred to. Looking to the design of the insolvent laws, as expounded in that case, which was to secure a prompt, single, and harmonious administration of the estate of the insolvent, which could only be effected by bringing all the parties interested before one and the same tribunal, it would seem to be essential that no one should be permitted to participate with the insolvent trustee, in the execution of the trust by which, as observed by the Court in that case, "adverse interests might be created, delays endangered, if not ensured, and probably different, and possibly conflicting tribunals consulted."

Considering that this question is in effect settled by the case in which these remarks were made, I shall pass an order dissolving the injunction issued upon the bill of the Bank of Westminster, and continuing that which issued upon the bill of the insolvent trustee.

JOHN NELSON, for the Bank.

DAVID STEWART, for the Trustee in Insolvency.

JOHN GLENN AND OTHERS,
vs.
MARGARET WOOTTEN AND OTHERS.

July Term, 1851.

[TRUSTEE'S SALE SET ASIDE FOR WANT OF NOTICE.]

A DECREE directed the trustee to give "at least three weeks notice, inserted in some newspaper," &c., "and such other notice as he may think proper, of the time, place, and terms of sale." Upon the day duly appointed for the sale the weather was inclement, no bidders were present, and there was no attempt to sell, and the trustee advertised the property to be sold four days thereafter, which advertisement appeared but once in the paper. HELD—That the failure to give the notice as prescribed by the decree, was a fatal objection to the validity of the sale.

A departure from the regulations of the decree in any essential respect, without first attempting to sell in conformity with them, will always prevent a ratification, if objection be made.

But after the trustee has once offered the property in the market, in the mode prescribed by the decree, and has been unable to sell it, he may dispose of it in a different mode, and then it is for the Court to say whether it will ratify the sale or not.

When the trustee sells in the mode and upon the terms prescribed by the decree, the Court has, by anticipation, bound itself to make good the sale, and will always do so, unless fraud, accident, surprise, mistake, or some cause is shown, manifesting gross want of discretion in the trustee.

But the faith of the Court is never pledged to ratify a sale made upon terms, or in a mode varying from the decree, even though the property has been once put in the market, in exact conformity with it, and the attempt so to sell has been unsuccessful.

The direction in the decree to give public notice is most essential, because without it competition can rarely be secured.

[The real estate of William T. Wootten, deceased, was decreed to be sold, under the proceedings in this case, for the purpose of paying his debts. The decree directed the trustee to give "at least three weeks previous notice, inserted in some newspaper printed in Prince George's County, and such other notice as he may think proper, of the time, place, manner, and terms of sale," which were one-third cash, and the residue in two equal annual instalments. The trustee, Mrs. Margaret Wootten, in her report states, that having advertised the land

for more than three weeks, she postponed the sale thereof, in consequence of the inclemency of the weather, until the 17th of December, 1850, when the same was set up at public sale, on the premises, and the whole tract, containing 1085½ acres, was sold to Mrs. Mary Hall, for $13 62½ per acre, being in all $14,489 95, she being the highest bidder therefor.

To this sale, Albert A. Berry, a creditor to a large amount of said William T. Wootten, deceased, filed objections, *because*

1st. The whole tract was put up for sale, and sold together, whereas it was capable of advantageous division, and if so divided would have sold for much more.

2d. Sufficient and reasonable notice was not given of the time, place, manner, and terms of sale, by advertisement in papers, or otherwise.

3d. Many persons desirous of purchasing parcels thereof, were kept from the sale by a report that the whole was to be sold in a lump.

4th. The widow's dower should have been first assigned, so that purchasers might know in what parcel she would hold the same.

5th. The sale made was done collusively, and with the view of being purchased at a depreciated value, for the benefit of the family of the deceased, and the injury of exceptant and his other creditors.

6th. The land only sold for $13 62½ per acre, being not one-third of its fair value, when if the same had been offered in parcels, it would readily have brought from $30 to $40 per acre.

Depositions were taken in support and in opposition to these exceptions, the purport of which sufficiently appears in the opinion of the Chancellor.]

THE CHANCELLOR:

This case is submitted upon exceptions to the sale reported by the trustee, Mrs. Margaret Wootten, and the depositions and arguments, in writing, of the solicitors of the parties, have been read and carefully considered by the Court.

The exceptions, so far as they refer to the manner in which the property was sold, and the amount at which it was struck off to the reported purchaser, are not, in my judgment, sustained. Upon examining and carefully analyzing and collating the proof, I find nothing to raise a reasonable doubt either of the perfect fairness of the sale, or that the property sold at an under value. On the contrary, everything appears to have been conducted in such a way as to remove all suspicion of management or contrivance to dispose of the estate for less than it was worth; and looking to the evidence, I see nothing to warrant the charge that the price given was inadequate.

But though the party objecting to the sale in this case has, in my opinion, failed in showing anything affecting its *bona fides*, he has interposed one objection which, under the circumstances, appears to me to be insuperable. This objection refers to what the late Chancellor called the "mere modal regulations," for the government of the trustee in putting the property in the market. These regulations are prescribed by the decree, and it will be found, I think, upon an examination of the precedents, that a departure from them in any essential respect, without first attempting to dispose of the property in conformity with them, will always prevent a ratification of the sale, if objection be made. In *Andrews* vs. *Scotton*, 2 *Bland*, 643, it was said, "If a trustee who is directed by the decree to sell the tract of land entire, and at public sale, should sell it at private sale, and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for so doing, *and no objection is made*, the sale may be ratified." It would appear from this case that if the trustee undertake to sell the property in a mode not warranted by the decree, he must not only report satisfactory reasons for so doing, but even then the sale will not be ratified if objection be made; and in the same case it is said, that the Court, acting as proprietor, and as if the property were its own, will avail itself of information from every quarter from which it may be derived; from the original parties to the suit, or the creditors for whose satis-

faction the sale is made, or from any other person, though, of course, more attention will be paid to objections coming from those who are interested than from volunteers.

But though the trustee must conform to the directions of the decree with regard to the manner of putting the property in the market, and any material deviation therefrom in the first instance, and without an attempt to sell in the mode prescribed, will defeat a sale made in a different manner, if the objection is interposed; yet still, after the trustee has once offered the property in the market, in the mode prescribed by the decree, and has been unable to sell it in that way, he may dispose of it in a different mode. The reason for this, as stated by the Chancellor in *Gibson's case*, 1 *Bland*, 144, is, "that the trustee being in all cases required to make a report in writing of only such a sale as he can, on oath, state to have been in all respects fairly made, which cannot be ratified without consent until public notice has been given to show cause, if any there be, why it should not be confirmed, there can be no danger or inconvenience in allowing him to deviate from the prescribed manner and terms of sale, after the property has, by advertisement, and an actual public offer to sell at the time and place appointed, been completely put in the market."

It is quite clear, therefore, if these cases are to be regarded as furnishing the true rule upon this subject, and I am, upon full reflection, satisfied they do, that this Court will not ratify a sale made by its trustee when, without an attempt to sell in the mode prescribed by the decree, he undertakes to dispose of the property in a different mode. It must be obvious that those portions of the decree which direct how, and in what manner, and upon what terms the property should be sold, are all mere unmeaning words if the trustee may, without an attempt to comply with them, sell in such mode and upon such terms as to him may seem fit. When, to be sure, the property has been put in the market, in the manner and upon the terms directed by the decree, and the effort so to sell has been unavailing, there can be no objection to the trustee's accepting a bid upon different terms, or to his disposing of the property at private

sale, subject to the ratification of the sale by the Court, after public notice given to show cause why it should not be confirmed. And even in these cases, when an ineffectual attempt has been made to sell according to the decree, and the property is then sold upon terms varying from it, objections to its ratification will prevail which would be disregarded if made to a sale in all respects in conformity with its requirements. And this, for the reason stated by this Court in the recent case of *Latrobe* vs. *Herbert et al.*, in which, upon full argument, it was held, that the faith of the Court was never pledged to ratify a sale made upon terms or in a mode varying from the decree, even though the property had once been put in the market in exact conformity with it, and the attempt so to sell had been unsuccessful. The principle of the decision being, that when the trustee, who is the agent of the Court, has sold the property in the mode and upon the terms specified in the decree, the Court has, by anticipation, bound itself to make good the sale, and will always do so, unless fraud, accident, surprise, mistake, or some cause is shown, manifesting a gross want of discretion in the trustee. Whilst in the case of a sale upon different terms, or in a different mode, inasmuch as no previous authority was given, the Court may, without any imputation of bad faith, refuse to give its sanction to it. In the one case, the agent having acted within the scope of his authority, and according to the mode prescribed for him by his principal, the latter, unless for some one or more of the reasons which have been suggested, is bound in good faith to give validity to his act; whilst in the other, the act derives its validity, if valid at all, from the subsequent adoption and ratification of it by the principal.

In the case now under consideration, the agent of this Court no doubt, from inadvertence, has departed from one of the most important directions of the decree, that of the public notice to be given of the time, place, manner, and terms of sale, and it would, as I conceive, be establishing a precedent full of danger, to ratify a sale under such circumstances in the face of an objection for that cause.

Is it not possible to vindicate the sale as reported from this objection, upon the ground that the notice of it was a mere continuation of that which was advertised for the 7th of December last, because on that day no notice was given that the sale would be postponed to any particular day. The proof shows that the weather on the 7th of December was most inclement, so much so, that no persons attended, or at least so few, that there could have been no competition. Mr. Charles C. Hill states in answer to the 5th interrogatory, "I do recollect the day. It was very wet and inclement. I went to the premises with my aunt, Mrs. Mary Hill. I found no one there, and suggested to the trustee to postpone the sale, and readvertise the land. I waited there until 3 o'clock, and no one attended. I then made the suggestion above." And the proof of all the witnesses who testify upon the subject, corroborate this statement in regard to the weather.

The trustee appears to have adopted the suggestion of Mr. Hill, and accordingly, on the 13th of December, advertised the property to be sold on the 17th of the same month, and the proof of the editor and publisher of the paper in which it was inserted, shows that it appeared in his paper but once, that being the day of the date of the advertisement. There was, therefore, but four days' notice given, though the decree expressly requires the trustee to give "at least three weeks' notice, inserted in some newspaper printed in Prince George's County, and such other notice as she may think proper, of the time, place, manner, and terms of sale." There was, therefore, a total failure to comply with this most vital direction of the decree, a direction which, perhaps, of all others, is most essential to the safety of persons interested in the sale of the estates of deceased persons, because unless public notice is given, competition, so indispensable to the disposition of property at its full value, can never or very rarely be secured.

It cannot be said that this sale should be ratified, because there was one attempt to sell the property at public auction after due notice, which was unavailing. The state of the weather, and the absence of bidders, on attempt to sell on the

7th, render it impossible to contend that that was putting the property completely in the market, in the manner and upon the terms prescribed by the decree. In point of fact, it was not put in the market at all, because there was on that day no market to put it in. In the absence of bidders, the sale was with great propriety postponed, without any attempt to dispose of the property.

Now, will it do to say that the property was sold for a fair price, and therefore the sale should be confirmed? The answer is, that when the decree directs "that the property shall be put in the market by advertising and offering it for sale," the trustee must follow the directions, but after he has done so, if it cannot be sold at public auction upon the terms specified, he may accept of a bid upon different terms, or he may dispose of it at private sale, and then it will be for the Court to say, when the trustee shall have made his report, whether, under all the circumstances, it ought to be ratified.

The true test of the value of property, is what it will bring in the market, and the interest of suitors requires that it shall be subjected to that test, and it would be dangerous for the Court, before that has been fairly tried, to enter into an examination of witnesses, who, however intelligent and unobjectionable in all respects, may not be able to supply the place of the only perfectly safe standard.

Upon the whole, then, though I see nothing in the evidence to induce a belief that the property sold at an undervalue, or that it would have brought more if sold in parcels, and although I am entirely satisfied that the sale was in all respects conducted with the most perfect fairness and propriety, yet still I consider it my duty to set it aside, and send the property again into the market, because in making the sale, the trustee did not act in conformity with one of the most important directions of the decree, and because in confirming it, I should be making a new, and in my opinion, a dangerous precedent.

Frank H. Stockett, for the Exceptant.
Pratt, for the Purchaser and Trustee.

JOHN H. ING, PERMANENT TRUSTEE OF JESSE BROWN,
vs.
JESSE BROWN AND ROBERT BRANNAN.

July Term, 1850.

[MORTGAGE—FRAUDULENT CONVEYANCES.]

A BILL of sale, intended as a security for money loaned and to be loaned, must be considered as a mortgage, though absolute upon its face.

The proviso to the 2d section of the Act of 1825, ch. 203, that the grantee shall not have the benefit of the recording of a conveyance which, by any other instrument or writing, appears to have been intended only as a mortgage, unless such other instrument be also recorded therewith, does not apply to the case of a deed absolute upon its face, and where no other instrument was executed, though it was intended merely as a security for money loaned.

An answer responsive to the bill cannot be overruled, unless contradicted by the testimony of two witnesses, or of one sustained by pregnant circumstances; circumstances standing alone will not destroy the answer.

A conveyance defectively executed, may be set up as a valid contract in Equity, and a confirmatory deed will give it full validity.

[The defendant, Jesse Brown, executed a bill of sale on the 13th of December, 1847, conveying to the defendant, Robert Brannan, all his stock of goods in a certain store in the city of Baltimore, in consideration of $800 paid by the grantor to the grantee. An affidavit was made to this conveyance by Brown, the grantor, that he received the full sum of money set forth therein, and purported to have been paid to him by Brannan, the grantee, on the 11th of April, 1847. A similar conveyance was made by the same party, of the same property, to cure the defect of the first deed, in that the affidavit thereto was made by the grantor instead of the grantee.

On the 14th of April, 1848, Brown applied for the benefit of the insolvent laws, and the complainant, John H. Ing, was appointed his permanent trustee; and on the 18th of the same month, filed the present bill in the Equity side of Baltimore County Court, impeaching said conveyances as fraudulent

under the statute of Elizabeth, and as executed in fraud of the insolvent laws, and by an order of said Court, passed upon his bill, he was appointed receiver, to take charge of the property contained in them.

The explanation given of this transaction, in the answer of Brown, is this: that in November, 1847, he being about to engage in business as a tobacconist, in the City of Baltimore, Brannan agreed to advance him the sum of $800, to aid him therein, and did accordingly advance him, between the 5th of said month and the 21st of January following, money, at various times and in various sums, which the answer particularly specifies, amounting in all to $584; and on the 11th of February following, he purchased of said Brannan various articles specified, amounting in all to $408; and that at Brannan's urgent request, he did, for the purpose of securing the payment of the sum already advanced, being then about $300, as well as the balance of said $800 agreed to be advanced and as a guarantee for which Brannan delivered to him a note of a Boston firm for $500, he executed the bill of sale of the 13th of December, 1847; and to cure the defect therein, subsequently executed that of the 11th of April, 1848. The other facts of the case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

It being admitted in the answer of Brannan, that his purpose in taking the bill of sale of the 13th of December, 1847, was to obtain a security for money loaned and to be loaned the grantor, I am of opinion that though the instrument is absolute on its face, it must be considered as a mortgage. *Dougherty* vs. *McColgan*, 6 *G. & J.*, 275.

Being a mortgage in contemplation of equity, it has been insisted that no effect can be given to it, and the grantee must lose the benefit of the security, by reason of the provision contained in the 2d section of the Act of 1825, ch. 203. But an examination of that statute will show it to be entirely inapplicable to such a conveyance as this. This is not a conveyance "which, by any other instrument or writing, appears to have

been intended only as a mortgage-security in the nature of a mortgage, though it be an absolute conveyance in terms," and of which, according to the enactment, the person for whose benefit such deed shall be made, shall not have the benefit or advantage of the recording thereof, unless the defeasance or qualifying instrument be also recorded therewith.

In this case no such defeasance or other instrument of wriing has been executed, and, consequently, none such could be recorded. The bill of sale here stands unaffected by anything in writing between the parties, and we get at the fact that it was designed simply as a security for money loaned and to be loaned, from the answer of the grantee. This case, therefore, must be decided without reference to the Act referred to.

It appears that the bill of sale of December, 1847, which was duly acknowledged and recorded, was supposed to be defective, in consequence of the affidavit required by the Act of 1846, ch. 271, with reference to the *bona fide* character of the consideration, having been made by the grantor instead of the grantee, and that to cure this defect and confirm the conveyance, a second instrument of the same description was executed, acknowledged, and recorded on the 11th of April, 1848.

These conveyances are assailed by the complainant, as the permanent trustee in insolvency of Brown, the grantor, upon the ground of fraud under the statute of Elizabeth, and as having been made in derogation of our insolvent system. The allegations of the bill, both with regard to the alleged fraudulent and covinous character of the transaction, and the insolvency and contemplated application for relief, when the first bill of sale was executed are explicitly denied by the answers of both defendants, that is to say, the fraud is denied absolutely and altogether, and the charge that the conveyances were made in view of the insolvent laws, and in violation of their provisions, is positively denied when the first was executed, both defendants insisting, and Brown especially, who of all men could speak most confidently of his condition and purposes, that he was not, at the date of the first conveyance,

insolvent in fact, and that he did not then contemplate availing himself of the benefit of the provisions of the insolvent laws.

Now, this answer being responsive to the averments of the bill, cannot be overruled, unless contradicted by the testimony of two witnesses, or by one sustained by pregnant circumstances. There is no pretence that he is contradicted by a witness, and circumstances standing alone, the Court of Appeals have said, will not destroy the answer. *Roberts et al.* vs. *Salisbury*, 3 *G. & J.*, 426. It has been urged that there is a contradiction or manifest inconsistency between the affidavit made by Brown to the first conveyance, and his answer to the bill. But although, strictly speaking, the whole consideration of $800 mentioned in the conveyance, had not been paid in cash at that time, I cannot bring myself to think that under the circumstances detailed in the answers, the party intended to commit perjury in that affidavit, or that he did not believe that substantially the consideration was paid.

Indeed, it appears to me a circumstance not undeserving of notice, and favorable to the fairness and frankness of the conduct of the defendants, that they have unreservedly stated the actual nature of that transaction. It can scarcely be doubted, that if they had designed a fraud, and to support that fraud by perjury, their answers to the present bill would not have exhibited any, the least difference from the affidavit. If perjury was committed in the affidavit taken before the magistrate, both the defendants were guilty, the one of perjury, and the other of subornation of perjury, and upon that supposition there is, I think, very little doubt the answers to this bill would have been formed in full accordance with the affidavit. Fraud, it has been over and over decided, is not to be presumed but must be proved, but in this case, which involves the charge of perjury as well as fraud, no witness has been produced to sustain it. If the answers speak the truth, the consideration expressed in them was paid by the grantee in the conveyances, and as they must be presumed to speak the truth, being responsive to the bill, unless disproved by that degree of evidence which the rule requires, I do not think there is any

principle which will authorize me in taking from the defendant, Brannan, the benefit of his security.

It is not denied that if the transaction was *bona fide*, that the conveyance of December, 1847, though defective by reason of the mistake in regard to the affidavit required by the Act of 1846, may be set up as a valid contract in equity, and that the confirmatory deed of April, 1848, would give it full validity. The case of *Alexander* vs. *Ghiselin*, 5 *Gill*, 138, establishes this proposition, and as, for the reasons stated, I am of opinion that the complainant has not succeeded in showing fraud, or that the conveyances are void under the insolvent laws, it follows that the complainant must be denied the relief prayed by his bill. But although the complainant is not entitled to a decree vacating the conveyances in question, yet inasmuch as these conveyances constitute mortgages, the case last referred to shows that the property embraced in them must be taken possession of and administered by the complainant, as the permanent trustee of the mortgagor. It is understood that the complainant, as receiver, under the appointment and authority of the Baltimore County Court, has sold the property, but I do not find among the proceedings a report of the sale, and therefore it is impossible to say whether the proceeds will or will not be sufficient, or more than sufficient, to pay the mortgagee's claim. My opinion, then, is, that the bills of sale shall stand and have effect as mortgages, and that the proceeds of the will made by the receiver shall be applied to the payment of the mortgage debt. The receiver should make a report of his sale, and then the cause should go to the Auditor for an account. The question of costs will be reserved.

J. H. Ing, and T. P. Scott, for Complainant.

C. H. Pitts, and C. S. S. Leary, for Respondents.

JOHN CAMPBELL WHITE AND MARY S. WHITE, HIS WIFE, vs. JOHN S. DONNELL AND BENJAMIN C. HOWARD. } SEPTEMBER TERM, 1850.

[INTEREST ON LEGACY—CONSTRUCTION OF MARRIAGE ARTICLES.]

WHERE no time of payment is fixed by the will and no interest provided for by its terms, the rule is irrevocably established that the legacy is not payable until the expiration of one year from the testator's death, and interest does not commence until then.

But where a legacy is given by a parent to a child, or where the testator stands to the legatee *in loco parentis* and the latter is otherwise unprovided for, then, whether a future time is fixed for the payment or not, interest will be allowed from the testator's death.

If other funds are provided for the support of the legatee, then, whatever the relation in which the testator stands to the former, the general rule applies.

A testator directed by his will, that his estate should be equally divided between his wife and daughter when the latter should attain the age of eighteen or marry; and until then, that his wife should occupy and enjoy the whole estate, to be applied to the proper maintenance of his family and the liberal education of his daughter. HELD—

That this provision for the maintenance and education of the daughter raises a trust, which Chancery will enforce.

A direction in a will, that the legacy shall be paid "*forthwith upon the decease*" of the testator, or "*as soon as possible,*" is not sufficient to supersede the general rule, that the legacy is payable and bears interest only from the expiration of the year from the testator's death.

By the terms of marriage articles, it was provided that "from and immediately after the death" of the intended wife, $20,000 were to be set apart out of the trust estate for the use of her daughter then living, provided she left no other issue living at her death; and if she left such other issue, then one equal child's share of the trust property, provided such share did not exceed $20,000, but only that sum if it did. This sum was to be ascertained and decided in writing by three disinterested persons, to be appointed by the trustee, the daughter, and the intended husband. The wife died on the 25th of April, 1839, during the minority of the said daughter, and leaving other issue, and the $20,000 were set apart for the daughter on the 9th of June, 1842. HELD—

That under all the circumstances of this case, the daughter was not entitled to interest on this legacy, from the death of her mother.

[The facts of the case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

The questions in controversy, raised by the pleadings in this case are, by an agreement filed on the 16th inst., reduced to two, and these are, *first*, as to the validity of the claim preferred in the bill, for interest on the sum of $20,000, from the 25th of April, 1839, the day of the death of Mrs. Ann Donnell, to the 9th of June, 1842, when the said amount of $20,000 in property was set aside for the complainant, Mary; *secondly*, as to the right of the defendant, Donnell, on the settlement of accounts with the defendant Howard, as shown by an Exhibit filed with the answer of the latter, to be credited for interest as therein charged, amounting to $361 33 on the money advanced by said Donnell, to pay one-half of the commissions and expenses for dividing the estate of E. J. Williams, and setting apart the $20,000 in property, as aforesaid, for the complainant Mary. By a supplemental agreement, the question first submitted was so far modified, as to leave the complainant's counsel at liberty to claim a proportion of the rents and profits of the estate of Mrs. Ann Donnell, received by the defendant Donnell, from the time of her death to the 9th of June, 1849, if the Court shall be of opinion that any of the averments of the bill raise such a claim. And it was further agreed that the complainant, Mary, notified the trustee Howard, in January, 1841, and afterwards, of her claim for interest on the $20,000.

Whether the complainants are entitled to interest on the sum of $20,000, or to a proportion of rents and profits, in lieu of interest, assuming the case made by the bill would justify a decree of the latter description, in the face of an exception denying such right, depends upon the true construction and legal effect of certain marriage articles entered into by Mrs. Ann Williams, the mother of the complainant Mary, and the defendant Donnell, on the 16th of September, 1849, just prior to their marriage. By these articles, Mrs. Williams

assigned and conveyed to the defendant Howard, her whole estate, then or thereafter to be acquired, *in trust* for her separate use, during the term of her natural life, and upon the further trust, in case the said Ann should die in the lifetime of her then intended husband, Donnell: "Then, from, and immediately after her death, the said trustee, or trustees under this deed for the time being, shall set apart from and out of the said trust property, in the best and fairest mode for all parties concerned therein, to be ascertained and decided in writing, and upon oath, by three disinterested and discreet persons, or a majority of them, to be appointed by the said trustee, Mary S. Williams, daughter of the said Ann, or those claiming, or who may claim under her and the said John S. Donnell respectively, the sum or value of $20,000, if the said Ann should leave no other issue living, at her death, than the said Mary, and her descendant and descendants, or the sum or value of one equal child's share of the said trust property, if the said Ann should leave such other issue, unless such share should exceed the said sum of $20,000, and if so, that they shall set apart only that sum out of such share as aforesaid, and hold the excess, or residue thereof, in trust, from and after the said John's death, for the use, intents, and purposes for which the said sum or value is hereby declared to be in trust; that is to say, that the said sum or value so set apart as aforesaid, and the said excess, when it shall accrue, and all other interests to be derived by the said Mary from the said Ann, under this deed, whenever the same shall arise, shall be held by such trustee or trustees in trust, from and after the said Ann's death, for the use of such persons and in such proportions as the said Ann shall, by will or like instrument, direct or appoint, her coverture notwithstanding, or in default of such direction or appointment, in trust for the sole and separate use and benefit of the said Mary S. Williams, for and during the term of her natural life, whether sole or covert, and from and after her death, in trust for the use of such persons, and in such proportions as she shall, by will or like instrument, direct or appoint, whether covert or sole; and in default of

such direction or appointment, for the use of the child or children of the said Mary, equally, and of their heirs, executors, administrators, and assigns for ever. And in case of the death of the said Mary in her mother's lifetime, without issue then living, or of the death of all and every of the child and children of the said Mary at any time under lawful age, and without issue, then living, in trust for the same uses, intents, and purposes for which the residue of the said trust property is directed hereby to be held." And then, after authorizing the said Mary to sell and dispose of the trust property, the articles proceed. "And in trust as to the residue of said property and effects not directed to be set apart as aforesaid, for the use of the said John S. Donnell, from and after the said Ann's death, for and during his natural life, and from and after his death, for the use of such persons and in such proportions as the said Ann shall direct, her coverture notwithstanding. And it is hereby declared to be the meaning of the expression, 'child's share,' as used in this indenture, with reference to setting the same apart as aforesaid, that it is such share as each child would be entitled to out of the trust property aforesaid, upon an equal distribution thereof among them." "And the said John S. Donnell doth, for himself, his heirs, executors, or administrators, covenant, promise, and agree to and with the said Ann Williams, that he will, well and truly, leave to the said Ann, all his estate, property, and effects which he may leave after the payment of his just debts, for and during the term of her natural life, if she should survive him, by his last will and testament."

It further appears from the proceedings, that Edward G. Williams, the father of the complainant Mary, and the first husband of Mrs. Ann Donnell, being seised and possessed of a large estate, real and personal, made his will, by which, with some inconsiderable exceptions, he devised and bequeathed the whole thereof to be equally divided between his said wife and daughter, whenever the latter should reach the age of eighteen years, or marry, with the consent of her mother, and until either of such events should happen, he directed that his said wife

should occupy and enjoy the whole of his estate, to be applied to the proper maintenance of his family, and the liberal education of his said daughter.

And it has been admitted by the parties to this suit, that from the death of Mrs. Donnell (formerly Mrs. Williams), on the 25th of April, 1839, to the 17th of March, 1840, when the complainant Mary attained the age of eighteen, the defendant Donnell received the income of the entire property left by said Edward G. Williams to his wife Ann, and his said daughter, and also of the property which the said Ann had acquired otherwise, said income amounting annually to about $4,500; and that said Donnell applied the same to his own use, except that therefrom during said period, he supported and educated the said Mary at an expense of about $1,500 per annum.

It was also admitted that from the said 17th of March, 1840, until the 9th of June, 1842, when the sum of $20,000 was set apart for the said Mary, said Donnell received and applied to his own use, the income arising on the moiety, or those which the said Ann acquired under the will of her first husband, Williams, and on the other property of said Ann, amounting annually to about $2,000. That the moiety or share which said Ann acquired under the will of her first husband, was of the value of about $55,000, of which about $22,500 was unproductive, and that the residue of the property of said Ann was of the value of about $18,000. The complainant Mary, having attained the age of eighteen on the 17th of March, 1840, intermarried with the other complainant, John Campbell White, in July following; and it appears by various Exhibits filed in the cause, that the *trust* originally conferred upon the defendant Howard, has been transferred to said John Campbell White, by deed dated the 23d of August, 1848.

It further appears, that on the 5th of July, 1841, the original trustee, Howard, Mary S. White, John Campbell White, and the defendant Donnell, in pursuance of the before-mentioned marriage articles, selected three persons, to set apart, from and out of the trust estate of the said Ann Donnell, deceased,

the sum or value of $20,000, or one equal child's part of said property. And the persons so selected being duly qualified, and having ascertained, by an examination of the trust property, that one equal child's share considerably exceeded $20,000, proceeded to set apart so much of said property, real and personal, as amounted to that sum or value, less $30 41, which they directed should be paid by the legal representatives of Ann Donnell, in cash; and did, on the 7th of June, 1842, accordingly set apart said property, to be held by said trustee Howard, for the sole and separate use of said complainant Mary, in conformity with the provisions of said marriage settlement.

This allotment, thus made by the persons so selected, was affirmed and ratified by the complainants and defendant, Donnell, as appears by a writing to that effect signed by them, which, though not dated, is admitted to have been signed on the same day. And by a declaration, dated the 14th of July, 1843, under the hand and seal of Howard, the trustee, he ratified and affirmed said allotment, and declared that he held said property for the use of the complainant Mary, according to the provisions of the said marriage settlement of her mother, Mrs. Donnell.

The bill in this case was filed on the 8th of June, 1849, and of the subjects of claim presented by it, all are, by the agreement before-mentioned, abandoned, except the claim for interest on the $20,000, or a proportion of rents and profits from the 25th of April, 1839, the day of the death of Mrs. Donnell, to the 9th of June, 1842, when the property was set apart, and from which period the complainants have been in the enjoyment of it, and, consequently, the first and most material question is whether, under the circumstances of this case, the claim, in either aspect of it, can be supported?

It may, I think, be very fairly inferred, that at the time this portion of the trust property of Mrs. Donnell was set apart and segregated from the rest of the estate, it was the impression of the defendants, Donnell and Howard, that the entire claim of the complainant in reference to this property was

adjusted, and that no further demand in respect thereof would ever be made. It is true, the agreement before referred to shows that the complainant, Mary, notified the trustee in January, 1841, and afterwards, of her claim for interest on the $20,000. But there is nothing in the record to show that any demand ever was made on either the trustee or Donnell, after the 9th of June, 1842, when the segregation took place, and the complainants received their $20,000 in property, until the bill in this case was filed, in June, 1847. The complainants, therefore, so far as the record informs us, acquiesced for seven years in what may safely be supposed was the impression of Mr. Donnell, that all questions between him and the complainants, with regard to this portion of the property, was finally settled and closed up.

But waiving any objection to this claim now set up, founded upon lapse of time or acquiescence, or upon any of the circumstances which have transpired since the death of Mrs. Donnell, I purpose very briefly to consider whether, upon the terms of the marriage settlement in this case, and in accordance with the principles which govern the Courts, in deciding the question of interest upon legacies or gifts in their nature testamentary, the complainants are entitled to interest, or a proportion of rents and profits, upon the sum of $20,000, as claimed in their bill.

Most of the rules upon this subject are stated by Mr. Justice Story, with his accustomed perspicuity and force, in the case of *Sullivan and Wife* vs. *Winthrop et al.*, 1 *Summer*, 1. It was there said, that in the case of a pecuniary legacy, where no time of payment was fixed by the will, and no interest provided for by its terms, the rule was irrevocably established, that the legacy itself was not payable until the expiration of one year from the testator's death, and that interest upon it did not commence earlier. And although the marriage articles in that case provided, that in the event that the intended husband of the testatrix should survive her, her trustees should, *forthwith upon her decease*, convey and transfer her property to such person or persons as she should appoint, or to whom

she should devise the same, the general rule was enforced, and the legatee denied interest until after the year, the Judge remarking, "that he could read no more in the articles than a general direction that the estate should be distributed, according to this will, upon the decease of the testatrix, which could only mean in a reasonable time, and did not supersede the general rules of legal interpretation." And in the case of *Webster* vs. *Hall*, 8 *Ves.*, 410, where the direction in the will was that the legacy should "be paid *as soon as possible*," the Master of the Rolls (Sir William Grant) decided, "that the legatee was not to receive interest except from the end of twelve months from the death of the testator;" "that the executors were not bound to pay upon the very day of the testator's death, nor was there any precise day upon which they ought to have paid the legacy."

But though the general rule in regard to the time when a pecuniary legacy shall commence to carry interest, when no time of payment is provided for by the terms of the will, is thus inflexibly established, there are exceptions to the rule as firmly settled as the rule itself, and one of these exceptions is, when the legacy is given by a parent to a child, or where the testator stands to the legatee *in loco parentis*, and the latter is otherwise unprovided for, for then, whether a future time is fixed for the payment or not, interest will be allowed from the death of the testator, upon his presumed intention to perform his moral obligation to maintain his child, or the person towards whom he has placed himself in the relation of parent. But if other funds are provided for the support of the legatee, then whatever may be the relation in which the testator stands to the former, the general rule applies. The exceptions are stated and proved in the case of *Sullivan* vs. *Winthrop et al.*, before referred to by numerous authorities, and neither can nor have they been questioned.

In this case it is undeniable that another and ampler fund was provided for the maintenance of the complainant, Mary, by the provisions of her father's will, and it is admitted that the injunctions of this will have been by the defendant, Donnell,

complied with in the most liberal manner; the facts agreed upon showing, that from the death of his wife, on the 23d of April, 1839, to the 17th of March, 1840, when the said complainant may, by the terms of her father's will, become entitled to the actual enjoyment of one moiety of his estate, he expended upon her education and support about $1,500 per annum. That the provision in the will of Mr. Williams for the maintenance and education of his daughter, does not amount to a mere recommendation, to be followed or not according to the discretion of the person to whom it is addressed, but, on the contrary, the language employed raises a trust which Chancery will enforce, is proved by the case of *Tolson* vs. *Tolson*, 10 *G. & J.*, 159, where terms less imperative were adjudged not only sufficient to create an obligation, but to constitute a charge upon real estate.

The case then stands clear of any influence which the relation existing between Mrs. Donnell and the complainant, Mary, would otherwise exert upon it if the latter had been destitute of the means of support, and is to be decided without reference to that relation or the moral duties it imposes.

The argument of the complainant's counsel is that, by the express terms of the marriage articles, upon the contingency which actually occurred, the sum or value of $20,000 was to be set apart, immediately upon Mrs. Donnell's death, for the use of the complainant, Mary, and the time being thus definitely fixed by the will, interest is to be paid from that period. This brings us to inquire, whether the time when this value of $20,000 is so to be set apart, is so absolutely fixed by the terms of the marriage articles as to entitle the complainant, Mary, to interest upon it from the death of her mother, though the general rule of the law would not so entitle her until a later period? We have seen that the words "*forthwith upon the decease*" of the testatrix, and that the legacy shall be paid "*as soon as possible*," have not been regarded of sufficient force to supersede the general rules of legal interpretation, and yet I think it must be admitted that this language is quite as strong as the terms employed in these articles.

There are, moreover, in this case, circumstances which in my judgment strongly repel the claim set up by the complainants. By the terms of the instrument under which they claim, the sum or value of $20,000 was not to be set apart for the complainant, Mary, in the event of her mother leaving issue other than herself, unless one equal child's share should exceed or be equal to that sum. It was not, therefore, an absolute and unconditional gift of the sum of $20,000, for in case the mother should have other issue living beside her said daughter Mary, and the said sum should exceed a child's share, then Mary was not to have that amount, but only one equal child's share. The mother, who executed the articles in contemplation of her marriage with the defendant, Donnell, which took place immediately thereafter, did leave other issue, and hence it became necessary, before setting apart the $20,000 for her daughter Mary, to ascertain whether the sum was more or less than a child's share. But this could not be done until the condition of her estate was ascertained, as preliminary to which the estate of her first husband was to be divided. It certainly would have been impossible, immediately upon the death of the mother, to have set apart $20,000 of her estate for the use of her daughter, the complainant, Mary, because it could not then be known whether that sum would exceed or fall short of a child's share.

There is, moreover, another ground, apparent upon the face of the instrument, from which the inference is strong, if not irresistible, that the mother did not and could not have intended that in case she died in the minority of her daughter, that this portion of her estate should be immediately set apart for her use. It will be observed that the property so directed to be set apart was "to be ascertained and decided in writing, and upon oath by three persons, or a majority of them, to be appointed by the said trustee, the *said Mary*, or those who may claim under her, and the said John S. Donnell respectively." The complainant, Mary, who was an infant at the date of the marriage articles, and at the period of her mother's death, was to appoint one of the persons who were to ascertain

and divide the property to be set apart for her use. Now, can it be supposed that her mother designed that she should exercise the power thus conferred upon her in her *minority?* It is more than probable that the mother did not anticipate the contingency of her own death during the minority of her daughter, but it is, I think, manifest that she did not in any event intend that this portion of her estate should be separated from the residue, until her daughter should attain an age competent to exercise the discretion which she conferred upon her. It is very clear that if the defendant Donnell, and the trustee, Howard, immediately upon the death of the mother, in April, 1839, selected persons to ascertain and appraise the property to be set apart for the complainant, she being then a minor, and incapable of making a selection, that she might, upon attaining her majority, have repudiated the Act, and insisted upon a new ascertainment and appraisement. By the express terms of the instrument, she was to appoint one of the persons to perform this duty, and she could not, as I conceive, be bound, unless, being capable, she made the appointment in the first instance, or gave her subsequent sanction to it.

There was nothing in the circumstances or prospects of the complainant Mary, which could have induced her mother to direct that she should have the immediate use of this property. She was by the terms of her father's will, entitled to a full moiety of his estate upon attaining the age of eighteen years, and in the mean time ample provision was made for her maintenance and education. In this state of things, it is not reasonable to suppose that her mother was so peculiarly solicitous to secure to her the immediate enjoyment of this fund, as to force upon her a legal capacity to act before the general rule of law she could possess that capacity.

In view, therefore, of all the circumstances of this case, and giving due weight to the acts of the parties since the death of Mrs. Donnell, I am of opinion, that the claim for interest, or rents and profits in lieu of interest, set up by this bill cannot be maintained, and therefore decide the first question against the complainant.

With regard to the second question, my opinion is, that the defendant Donnell is not entitled to be credited for interest as charged in the account, exhibited with the answer of the defendant Howard, on the money advanced to pay expenses incurred in dividing the estate of Edward G. Williams, and setting apart the $20,000, for the complainant Mary. It appears to me, that one-half of these expenses was fairly chargeable to Mr. Donnell, under the circumstances stated in the answer of the trustee Howard: and I do not see upon what principle he can be credited with interest upon moneys thus paid.

As the defendant Howard is not interested in the questions which have been argued, I have thought I would not longer withhold my opinion upon them, reserving for further consideration and discussion the claim for commission set up in his answer.

BROWN and BRUNE, for Complainants.
J. MEREDITH, for Defendants.

FRANK H. STOCKETT
vs.
LEMUEL G. TAYLOR, AND OTHERS.

DECEMBER TERM, 1849.

A. MORTGAGED to B. property on which C. held the vendor's lien. C. sells it, to pay the balance of his debt. HELD—That the proceeds of sale, after satisfying C.'s debts, are subject to the mortgage to B.; the rights of the mortgagee not being affected by turning the lands into money, the lien of the mortgage attaches upon the surplus proceeds of sale.

Whatever information is sufficient to put a party upon inquiry, is sufficient *notice* in equity.

The purchaser of an equity of redemption, sold under a proceeding against the mortgagor, has as clear a right to redeem as had the mortgagor himself.

Where a party purchases an equity of redemption at a sheriff's sale, made

in legal form, he will not be discountenanced by the Court, when seeking to redeem, because of the inadequacy of the price paid by him. Where, under such circumstances, he runs the risk of buying a worthless title, he will be allowed the benefit of his purchase, if it results advantageously.

[The bill in this case was filed upon the 7th of August, 1849. It alleges that Gustavus R. Barber, being seized of a tract of land called "the President," lying in Anne Arundel County, and of certain lots in the city of Annapolis, executed to Ann Ridgely, now deceased, a mortgage of the said property, by deed dated 10th January, 1840, to secure the sum of $2,000, due by him to her. That on the 20th of January, 1840, the said Ann Ridgely assigned the said mortgage to David Ridgely, by deed of that date, reserving to herself the interest accruing on the said debt, which was still to be paid to her, as provided in the original mortgage. That David Ridgely being about to borrow $2,000 from the Farmers' Bank of Maryland, in order to induce Robert Welch, of Ben., and John W. Whittington, to become endorsers on his note in bank for that amount, conveyed the said assigned mortgage and debt to the said Welch and Whittington, by deed dated 4th September, 1840, in trust to hold the same as security to them from any loss by reason of said endorsement, and in further trust to apply the moneys which might be received by them under said assignment, after satisfying the life estate reserved, as aforesaid, to Ann Ridgely, to the payment of the said note, and the residue, if any, to the said David, and in further trust, to reconvey the same if the said David should pay the note. That the note thus endorsed was discounted by the Bank, on the 8th of September, 1840, and renewed from time to time until the 5th day of June, 1842, when it was protested for $1,550, the sum of $450 having been paid on account thereof by the said David. That at the October Term, 1843, of Anne Arundel County Court, judgments were recovered against the said Welch and Whittington by the Bank, for the balance due on said note—the said David having left the State of Maryland. That after the protest of the said note, the said David, on the 27th day of December, 1842, assigned, in writing, to George E. Franklin, all his remaining

interest in the said mortgage, arising, as he alleged, from the payment by him of the said $450 on account of the said note, to secure a debt due by him to the said Franklin—the said Welch and Whittington assenting to said assignment. That Barber properly paid Ann Ridgely the interest reserved in the assignment to David Ridgely, until her death, which took place in 1845; and the complainant insisted that the said assignment to Franklin, for various reasons, carried with it no substantial interest in the said mortgage. That the said tract of land, called "the President," had been purchased by Barber from trustees in Chancery, on the 19th of October, 1838, and that, at the date of the mortgage to Ann Ridgely, there remained due by Barber to the trustees a portion of the purchase-money. That the trustees recovered a judgment in Anne Arundel County Court against the said Barber for that balance, and on the 12th day of April, 1842, the said land was sold by the sheriff, to satisfy said judgment, to Ezra Sheckell, and the said Sheckell was substituted as purchaser under the decree, with the consent of Barber. That it was then agreed by parol between Barber and Sheckell, that the latter should sell the land, and after paying himself all debts due to him by Barber, and the amount of the purchase-money to be paid to the sheriff, that the residue should be paid to Barber. That the trustees conveyed the land to Sheckell, and that Sheckell sold the same to Robert Sinclair, Sr., and after retaining out of the purchase-money the amount due to him by Barber, and the amount paid by him to the sheriff, there remained of the purchase-money the sum of $1,607 81, with interest, which Sinclair was directed to pay to Barber when it became due; but which, the complainant alleges, was properly payable to Ann Ridgely and her assigns, and should therefore have been applied to the payment of the note of David Ridgely in bank, and then to the payment of Franklin's debt. That Welch and Whittington, fearing that they would be compelled to pay the said note, were about to foreclose the mortgage to them, when Lemuel G. Taylor agreed with them and Barber, that if Barber would assign to him the sum due by Sinclair, he would assume the

payment of the said note—the said endorsers to suspend proceedings under the mortgage. That Barber assigned the said sum, and Sinclair gave Taylor his note for the same, and executed to him a mortgage of the farm to secure its payment, dated 28th August, 1843. That Taylor, on the 10th of January, 1834, delivered to the Bank his note, endorsed by Welch and Whittington, for the full amount due on the note of the said David Ridgely, and had the Bank's judgments against Welch and Whittington entered to his use. That a balance is now due upon Taylor's note to the Bank. That Sinclair has long since paid Taylor the amount of his note to him, and obtained a release of the mortgage. That at the time of the said agreement, Barber gave Taylor the authority to receive the rents of the house and lots in Annapolis, to save him from loss on account of the said note in bank; that Taylor received the rents for some time, and then re-delivered the said property to Barber, and that Taylor, from various sources, has long since been more than indemnified for any loss on account of said note. That on the 24th day of July, 1849, the Sheriff of Anne Arundel County offered for sale the said house and lots, under a judgment due by Barber to the A. & E. R. Railroad Company, recovered in October, 1848, when the complainant became the purchaser thereof; that he has paid the sheriff for the same, and has received from him a conveyance thereof, and entered into possession. The bill then prays that an account may be taken, to ascertain the amount due upon the mortgage to Ann Ridgely, and that upon the payment thereof by the complainant, the said mortgage, and the several assignments thereof, may be released to him, and the judgments against the said house and lots be entered satisfied, or that the property may be sold by this Court, and the proceeds brought in for distribution among those entitled, and for further relief.

The defendants filed their answers, the purport of which sufficiently appears from the Chancellor's opinion.]

THE CHANCELLOR:

The pleadings in this case are voluminous, and present a

variety of questions; but upon the argument the complainant's counsel narrowed the questions down, so as to limit the inquiry to the proper application of the sum of $1,897 22, received by the defendant, Taylor, from Robert Sinclair, on the 1st of October, 1845, in discharge of the mortgage of the 28th of August, 1843, executed by Sinclair and wife to Taylor, to secure the payment of $1,607 81, which the mortgage recites was due from the mortgagor to Gustavus R. Barber, and by him assigned and transferred to the defendant, Taylor.

The bill alleges that Taylor, in consideration of this assignment, agreed to assume upon himself the payment of a note discounted and held by the Farmers' Bank of Maryland, the money so assigned being, as is alleged, the proceeds of land pledged and bound for the payment of said note.

This agreement Taylor, in his answer denies, and avers, on the contrary, that he received the money from Sinclair in payment of debts due from Barber to him at the date of the mortgage, amounting to the sum of $1,550, and that he has long since paid to Barber the difference between the sum paid by Sinclair and the debt of Barber to him.

There is certainly no proof in the case of a positive nature establishing the agreement, as stated in the bill, though there are circumstances from which it is difficult to escape the conclusion that some such understanding did exist. That Welch and Whittington, who were endorsers upon the note held by the Bank, and to whom David Ridgely, the assignee of the mortgagee, Ann Ridgely, had assigned the mortgage for their indemnity as such endorsers, should have permitted or consented to any other appropriation of the money, is in the highest degree improbable.

But conceding that the case is destitute of direct evidence of such an agreement, and that the circumstances are not strong enough to establish it in the face of the denial in the answer, still it appears to me to be very clear, upon principle and authority, that the money should be so applied.

The mortgaged premises were unquestionably and confessedly bound for this debt to the Bank, the mortgage having been as-

signed to Welch and Whittington, the endorsers of David Ridgely, for their indemnity as such.

Taylor says in his answer, that he was induced to take this debt upon himself, because he ascertained that Welch and Whittington were about to sell the town property to pay the Bank and exonerate themselves; and it appears that he did give his note to the Bank, with Welch and Whittington as endorsers. It is true the sale by the sheriff to Sheckell, and by Sheckell to Sinclair, preceded this assumption of the Bank debt by Taylor; but the money due from Sinclair to Barber had not then been paid to Taylor, his assignee. It still remained to be paid; and the mortgage from Sinclair to Taylor, dated 28th August, 1843, recites, "that Sinclair was indebted to Barber in the sum of $1,607 81, payable on the 1st of October, 1845, for that part of the purchase-money due the said Barber, for the tract or parcel of land sold by him and his wife to Sheckell, and by the latter to Sinclair." This land thus sold by Barber to Sheckell, and by the latter to Sinclair, formed a part of the property previously mortgaged by Barber to Mrs. Ann Ridgely. It was sold to satisfy the purchase-money due from Barber to his vendors, and by an arrangement between him and Sheckell, the said sum of $1,607 81, being part of the price agreed to be paid by Sinclair upon his purchase from Sheckell, was to be paid to Barber. This money then, in the hands of Barber, being a portion of the proceeds of the mortgaged estate, was equally bound by his mortgage with the land itself. When he mortgaged this property to Ann Ridgely, it was bound by the prior lien of the vendors, and after the payment of that prior lien, the surplus proceeds of the sale represented the mortgagor's interest in the land mortgaged, and was subject to the mortgage; the equitable principle being, that under such circumstances the mortgage becomes a lien upon the fund, instead of the interest of the mortgagor in the land. According to the decision of the Chancellor, in *Astor* vs. *Miller*, 2 *Paige*, 68, the rights of the mortgagees are not altered by turning the estate into money, for the Court directs the money to be applied according to the rights of redemption. The same prin-

ciple was asserted and enforced by the Court in the case of *Bartlett* vs. *Gale*, 4 *Paige*, 504, in which it was held, that the lien of the mortgage attached upon the surplus money in the hands of the sheriff, who sold under an elder judgment, and that he could not pay such surplus to the mortgagor.

If, to be sure, Taylor had received the money from Barber, for a valuable consideration paid him, without notice that it was a part of the purchase-money of the mortgage premises, the case might be subject to different considerations; but the very deed under which he claimed, advertised him of the fact that the money was due Barber, "as part of the purchase-money of the land sold by him to Sheckell, and by the latter to Sinclair;" and the registry of the deeds and the admissions of the answer are sufficient to bring home to him, in fact or constructively, knowledge that this land was included in the mortgage, and had been pledged for the payment of the debt to the Bank. Certainly, if the defendant Taylor had not actual knowledge of these circumstances, he had information enough to put him on inquiry, and that is sufficient notice in equity. *Magruder* vs. *Peter*, 11 *G. & J.*, 243. He knew that in fact, or he is to be treated as knowing, that this land was mortgaged by Barber to Ann Ridgely for $2,000; that the mortgage, with a limited reservation, was assigned by Ann Ridgely to David Ridgely, and by the latter to Welch and Whittington, to secure them as his endorsers in Bank to the same amount, and that this surplus remained to Barber, the mortgagor, after paying prior incumbrances upon the land. Knowing all this, the mortgage unquestionably fastened upon the money in his hands and bound it as effectually and firmly as it did in the hands of Barber his assignor. His subsequent conduct is strong to show that he so regarded it. He took the mortgage from Sinclair on the 28th of August, 1843, to secure the payment of this money; and on the 9th of January following, he actually did assume the debt to the Bank, by substituting his note for that of Ridgely, endorsed by Welch and Whittington, the same persons becoming his endorsers. It is true that Taylor in his answer says (and it also appears by

copies), that he took an assignment of the judgments which the Bank had recovered against Welch and Whittington, as the endorsers upon the note of Ridgely; and he alleges that he looks to these parties primarily to secure him against his responsibility to the Bank, though the mortgage may ultimately be responsible to him for the debt.

It does appear that this judgment was so assigned to Taylor by the Bank, but it certainly does not appear that Welch and Whittington had agreed, as between Taylor and themselves, to become primarily bound for this debt; and such an agreement is so improbable, not to say irrational, that it is impossible to presume it. Taylor says in his answer, that he agreed to take this Bank debt upon himself to prevent Welch and Whittington from selling the town property, as they informed him they proposed to do, and he actually, in the negotiations with the Bank, assumed the attitude of the principal debtor by becoming the maker of the note. He had also at that time in his hands an assignment of Barber's proportion of the proceeds of the property sold to Sinclair, being a part of the mortgaged property which stood between the endorsers and loss; and yet his pretension now is, that though he had thus in his hands a portion of their security, and though they, upon his assuming the debt, had forborne to proceed against the unsold mortgaged premises, and though he, and not Welch and Whittington, was the principal debtor in the note to the Bank, still because he had taken from the Bank an assignment of the judgments against those parties, they, and not he were primarily liable. It seems to me impossible to maintain such a position; and I am, therefore, of opinion that the money received by Taylor from Robert Sinclair on the 1st of October, 1845, is applicable to the payment of the mortgage debt.

The complainant in this case purchased the equity of redemption of the mortgagor, Gustavus R. Barber, in July, 1849, sold under an execution issued upon a judgment against him in favor of the Annapolis and Elk Ridge Railroad Company.

That the complainant as the purchaser of the equity of redemption has a right to redeem, has not been, and cannot be

disputed. Claiming an interest by purchase from and under a judgment against the mortgagor, the right of redemption is as complete in him as it was in the mortgagor himself. The authorities are explicit upon this subject. 1 *Powell on Mortgages*, 261, *et seq.*

But it is said the complainant in this case is not entitled to the favorable consideration of the Court, because he gave a very inadequate price for the property, and is a mere speculator without merit, in whose behalf the Court should not actively interpose. The complainant, however, it will be remembered, purchased at a public sale made by the sheriff, after full notice, and it is not pretended that all the requirements of the law to give legal validity to such sales, were not observed. The property was known to be incumbered, and the title involved in doubt and embarrassed with difficulties; and no one could be found, after a long interval, but the complainant who was willing to buy and take upon himself the expenses, risk, and trouble of disentangling the title.

The Railroad Company, the plaintiff in the judgment under which he purchased, makes no complaint, although the sum bid by him at the sheriff's sale covered but a small portion of their debt, and it is more than probable the residue will be lost to them. It has not been stated, and does not appear that the plaintiffs in the judgment made any objection to the sales or are at all dissatisfied with it, nor has any intimation been thrown out that it was not in all respects a perfectly fair transaction, and I cannot, therefore, understand upon what grounds the purchaser is to be denied any of the rights which the title thus acquired by him would, under different circumstances confer. He assumed the risk of buying a worthless title, and if the result should be advantageous to him, I am of opinion he should have the benefit of it.

In order to a final adjudication of the questions arising in this case, it must go to the Auditor to state the necessary accounts between the parties. From what has been stated, it will appear that I am of opinion, that the money received by the defendant Taylor from Sinclair should be applied to the

payment of the mortgage debt; that he is to be credited with the several sums paid by him to the Bank, and that any balance which may remain in his hands after such credits are allowed him shall be applied—firstly, to the payment of what may remain still due to the Bank; and secondly, to the payment of the claim of George E. Franklin, assignee of David Ridgely. If it should appear by the accounts that the mortgage debt is not extinguished and fully satisfied by this application of the money received by the defendant Taylor, or if from any other cause the money so received should prove to be unavailable for that purpose, then I am of opinion that the property purchased by the complainant is liable and must be sold, or may be redeemed by such payment as may hereafter be determined.

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[The Chancellor then passed an order in accordance with the foregoing opinion. Four accounts were stated by the Auditor; and on the 8th of May, 1850, the Chancellor passed a decree ratifying accounts A and B, and ordering the complainant to pay to Taylor and Franklin the sum assigned them in said accounts, and the defendant Taylor to pay to the Bank the residue of the amount due on his note: and that upon the payment of the said sums, the mortgages upon the said property should be decreed to be released and the judgments entered satisfied, and the complainant should hold the said property discharged from all claim of any of the parties to the suit: and that in default of such payment by the complainant or defendant Taylor, by a day limited, the property should be sold by a trustee named in the decree.]

—

Frank H. Stockett, for Complainant.
A. Randall, for The Bank and Franklin.
McLean, for Taylor.

CAROLINE C. PURDY
vs.
THOMAS PURDY ET AL.

DECEMBER TERM, 1850.

[DOWER—RESULTING TRUST—JOINT TENANCY.]

A WIDOW is not entitled to dower in an equitable estate held by the husband during coverture, unless he also *dies* the owner of such estate, and if he parts with it during marriage, though without the concurrence of the wife, she will be deprived of her dower.

Land was purchased by four brothers, and the title conveyed to but two of them, who, on the same day, mortgaged it to the Bank for money loaned for the payment of the purchase-money. The two to whom the title was not conveyed, paid their share of the debt to the Bank, but there was still a balance due on account of the whole debt, and the Bank still held the mortgage, when one of said two died. HELD—

That his widow was not entitled to dower.

If an estate is purchased in the name of one, and the consideration-money is actually paid at the time by another, there is a resulting trust in favor of the party paying, provided the payment of the money be clearly proved.

If only a part of the purchase-money is paid by a third party, there will be a resulting trust in his favor *pro tanto*, and the same doctrine applies to a joint purchase.

But it is indispensable to the creation of such a trust, that the money should be paid *at the time* of the purchase.

It is not sufficient that the words employed would, but for the Act of 1822, ch. 162, be construed to create a joint-tenancy, to create such an estate, unless the instrument *expressly provides* that the land shall be held in joint-tenancy.

[The facts of the case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

The question involved in this case has twice engaged the attention of the Court of Appeals, and upon each of these occasions, the widows claiming dower in lands which had been held by equitable titles in their husbands, were defeated.

In the first case, which was that of *Hopkins et al.* vs. *Frey*, 2 *Gill*, 359, the husband executed a mortgage of the land

prior to the marriage, and then after the marriage, but prior to the Act of 1818, ch. 193, he mortgaged his equity of redemption, which was sold under a decree obtained by the mortgagees in the year 1823, and it was against these claiming under the purchasers at that sale, that the widow claimed her dower. The Court, in that case, lay much stress upon the fact that the husband had mortgaged his equity of redemption prior to the passage of the Act of 1818, ch. 193, which is the origin in this State of the title of widows to dower in lands held by equitable title in the husband, and it might possibly be fairly inferred from the language of the Court, that the widow's claim would have been successful, if the date of the mortgage of the equity of redemption had been posterior to the passage of the Act of Assembly. But from the subsequent case of *Miller* vs. *Stump*, 3 *Gill*, 304, it would appear that if the husband transfers his equitable estate at any time during his life, the widow will be deprived of her dower; the Court in this last case saying, "The Act of Assembly does not say, and it ought not to be construed to mean, that the widow shall be entitled to dower in lands held by equitable title in the husband at *any time* during the coverture."

The conclusion from these two cases is, that a widow is not entitled to dower in an equitable estate held by the husband during the coverture, unless he also *dies* the owner of such estate, and that if during the marriage, he parts with it, though without the concurrence of his wife, she will be deprived of her claim to dower, if she survive him.

In this case the question is, whether the complainant, who is the widow of Galen Purdy, is entitled to dower in a parcel of land purchased of Joseph N. Stockett and wife, and conveyed by them to Thomas and Henry Purdy, on the 11th of September, 1839? The proceedings show that this piece of land was purchased of Stockett and wife, by Thomas Purdy, John Purdy, Henry Purdy, and Galen Purdy, though the title was conveyed to Thomas and Henry. And that on the day of the date of said conveyance, these last-named parties conveyed the same land, by way of mortgage, to the Farmers'

Bank of Maryland, to secure the payment of the sum of $4,125, borrowed of the Bank on their joint note, endorsed by William O'Hara and Joseph N. Stockett, the money being borrowed for and applied to the payment of the said land. And it is further shown and admitted, that Galen and Henry Purdy have paid the whole of their share of the debt due the Bank, and that the balance still due being about $228, is to be paid by Thomas Purdy and John Purdy, though the Bank holds all the parties to the note and the entire mortgaged premises responsible for such balance. It is also shown that in the year 1845, these parties, Thomas, John, Henry, and Galen Purdy, appointed by parol, two persons, to make a division between them of a parcel of land inherited from their father, John Purdy, and of that purchased from Stockett and wife, and that in pursuance of such appointment, they did, in that year, make a division, causing the lands to be surveyed and a plot and certificate made by the County Surveyor, designating one portion as lot No. 1, and the other as lot No. 2. That it was then agreed between the parties, that Henry and Galen Purdy should occupy one side of the division line marked by the parties selected for the purpose, and that John and Thomas Purdy should occupy the other side. That lot No. 1, which was to be taken by Henry and Galen Purdy, embraced all the land which descended to the parties from their father, John Purdy, except about twenty acres, and also of from eight to twelve acres of the land purchased from Stockett and wife. And that lot No. 2, which was to be taken by John Purdy and Thomas Purdy, included the entire residue of said two parcels of land. And it was in proof, that the said parties occupied and cultivated the said property separately, according to said division, in the year 1845, and that no attempt was ever made to disturb the same during the lives of Henry and Galen, who died in October, 1850, Galen having survived Henry a few weeks only.

The question presented now is, whether the widow of Galen, under this state of facts, is entitled to dower in that portion of the land purchased of Stockett and wife, which is comprehended

in lot No. 2, and which, according to said division, was assigned to Thomas and John Purdy, in 1845, and of which they have been in the undisturbed possession and enjoyment from that time until this bill was filed, in November, 1850?

If the deed from Stockett and wife to Thomas and John Purdy created a resulting trust in favor of Galen, to the extent of the purchase-money paid by him, still, if he consented to the mortgage executed by the grantees to the Bank, to secure the payment of the money bound to pay for the land (and that he did so consent there is no room to doubt), he thereby parted with his equitable title, and his widow, to whom he was not married until September, 1850, can have no claim to dower, because, in that case, he not only did not hold the equitable title at the time of his death, but never had it during the coverture. It is true, the answer of the defendants admits, that so much of the debt due the Bank as, according to the understanding between these parties, Galen and Henry Purdy were required to pay, has been paid, but still a portion of the mortgage debt to the Bank is due, and the equitable title of Galen is held by the Bank as security for such payment.

In the case of *Hopkins* vs. *Frey*, the Court of Appeals say: "Our State adheres to the English law (which declares a widow shall not be endowed of an equity of redemption), except when and so far as it may be changed by our Legislature." And it was decided in that case, and in the subsequent case of *Miller* vs. *Stump*, that the widow shall not be endowed of such equity, if the husband parts with it in his lifetime. It is not a very easy matter to determine what sort of an interest Galen Purdy had in the land purchased from Stockett and wife. He certainly had no legal title, because the land was conveyed by the vendors to his brothers, Thomas and Henry Purdy; and upon the facts as exhibited by this record, there might be some difficulty in saying there was a resulting trust in his favor, implied by law, from the manifest intention of the parties. There can be no doubt, that if an estate is purchased in the name of one, and the consideration-money is actually paid at the time by another, that there is a resulting trust in

favor of the party paying, provided the payment of the money be clearly proved; and if only part of the purchase-money is paid by a third party, there will be a resulting trust in his favor *pro tanto;* and the same doctrine applies to a joint purchase. But then it seems to be indispensable to the creation of such a trust, that the money should be paid *at the time.* 4 *Kent's Com.*, 305, 306.

Now, in this case, it is quite apparent, that no part of the purchase-money of the land in question was paid by Galen Purdy *at the time* of the purchase, nor was it borrowed from the Bank upon his responsibility, the note upon which the money was loaned having been made by Thomas and Henry, and endorsed by O'Hara and Stockett. In truth, there is nothing in the case to show clearly when, or what proportion of the money was paid by Galen, the admission of the answer being, that Galen and Henry had paid their share of the Bank debt, but in what proportions between them, or at what periods they paid, does not appear either in the pleadings or proofs. It might, therefore, be somewhat difficult to make out a resulting trust in favor of Galen, or to define clearly the character of the interest he had in the land. But whatever that interest was, it was certainly not a legal estate, and being now in the Bank, from whom the money was borrowed to pay for the property, and having been there from a period anterior to and during the coverture, my opinion is, the widow of Galen has no claim to dower in it.

These lands were divided in the way mentioned, and by agreement of the parties, in the year 1845, and have been cultivated and enjoyed according to said division from that time until 1850, when Henry and Galen died. My opinion is, that this division was designed to be permanent, and it is quite possible that upon a proper application, it would be enforced in Equity. I cannot concur in the argument of the solicitor for the complainant, that it was only intended as a temporary arrangement for the purpose of cultivation, or for some other purpose of that description. It is not at all probable, I think, that if the division was only intended to be temporary, the parties would have called in third persons to

mark out the dividing line, and would have gone to the expense of employing the County Surveyor to make out a plot and certificate, showing the precise limits of the portions to be held by each, and the contents of each parcel. All this appears to me indicative of an intention to separate the parts permanently, and it may be, that they were only waiting for the final extinguishment of the debt to the Bank, to interchange deeds.

But the Court is not now asked to enforce the agreement specifically, and therefore the doctrine urged in the argument, of the necessity of proving the agreement precisely as stated in the bill, when a specific execution of a parol agreement in relation to lands, is asked upon the ground of part performance, does not apply. All that is intended to be said now is, that upon this bill, and at the suit of this complainant, I am not disposed to disturb that division with which all parties (except the complainant), including the widow of Henry Purdy, appear to be satisfied.

The Court will sign a decree to lay off the dower of the complainant in that portion of the land assigned to her husband and Henry Purdy, after first giving dower to Susan Purdy, the widow of John Purdy.

Something was said, in the course of the argument, in relation to the character of the estate which these parties took, in the portions of the land assigned to them by the persons selected to make the division. The Surveyor has noted upon the plot, that No. 1 is "to be held jointly by Henry and Galen Purdy," and lot No. 2 "is to be held jointly by Thomas and John Purdy;" and it was suggested that this might constitute them joint tenants of the respective lots so assigned them. I do not think, however, that this memorandum of the Surveyor can have the effect attributed to it. In the first place, it was no part of his duty to prescribe the estate, or the qualities of the estate, which the parties should hold in these parcels of land, nor did the parties selected to make the partition, possess any such power. They were to divide the land, but not to say how, or by what title it should be held, and con-

sequently, when the division was made, their authority was exhausted. But independent of this, the Act of 1822, ch. 162, in my judgment, even if the plot, with the memorandum in question, created the estate (which, however, it does not), would prevent the effect supposed. It is not sufficient, in my opinion, that the words employed would, but for the Act, be construed to create a joint tenancy, unless the instrument *expressly provides* that it shall be held in joint tenancy.

A. B. HAGNER, for Complainant.
McLEAN, for Defendants.

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2. It has been the usual practice for administrators *pendente lite* to give bonds, and there is no doubt of the legal validity of such bonds. *Ib.*

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1. Under the Act of 1841, ch. 262, and its supplements, alimony is an incident to the power of granting divorces, and cannot be awarded to the wife except as a consequence of the exercise of such power. *Dunnock* vs. *Dunnock*, 140.
3. But the Act of 1777, ch. 12, sec. 14, giving the Chancellor as full authority in cases of alimony as the Ecclesiastical Courts have in England, is not repealed by the Act of 1841, ch. 262. *Ib.*

ALIMONY.—*Continued.*

4. Upon a proper case, this Court will grant the wife alimony, or a suitable maintenance by the husband, or out of his estate, though a divorce, *a mensa et thoro*, be not asked for. *Ib.*
5. The wife under certain circumstances is entitled to alimony, to be paid by the husband, or out of his estate, but no case has been found where the Court, upon an application for alimony, has investigated the character of alienations of property made by the husband, so as to compel his alienee to pay the allowance to the wife. *Ib.*
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1. None but parties to the judgment or decree appealed from, have the right of appeal, and the execution of such judgment or decree cannot be stayed or delayed unless the party *against whom* it was rendered or passed gives bond. *McKim & Kennedy* vs. *Mason*, 186.
2. The general rule is, that an appeal will not lie from a merely practical order of this Court, preparatory to the final hearing, and by which the rights of the parties are not affected. *In re Rachel Colvin, a lunatic*, 278.
3. The Act of 1830, ch. 185, gives by implication an appeal from orders *appointing* receivers, but does not give the right of appeal from orders *discharging* receivers, and the legislature has never, in terms or by any fair implication, given such right. The power of appointing receivers is a high power, never exercised where it is likely to produce irreparable injustice, or where there exists any other safe or expedient remedy. *Ib.*
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ASSIGNMENT, ASSIGNOR, ASSIGNEE.

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ASSIGNMENT IN FAVOR OF CREDITORS.

1. A deed conveying property, real and personal, in trust, to sell and apply

ASSIGNMENTS IN FAVOR OF CREDITORS.—*Continued.*

the proceeds, 1st, to the payment of costs and commissions, and 2d, to the full payment of such creditors, named in an annexed schedule, as assent and release within a fixed time, "if the fund be sufficient for that purpose, and the balance, if any," to one of the grantors and his representatives, "but rateably and proportionably, according to the amount of the claims of each of said creditors, if the fund be insufficient to pay the whole;" *provided*, the shares of the non-assenting creditors "shall not be distributed among the others," but shall be held by the trustees, "subject to the future order and control of" the said grantor, is valid. *Hollins* vs. *Mayer et al.*, 343.

2. The fund not proving sufficient to pay the assenting creditors in full, they can only receive dividends, in the proportion that their claims bear to the whole amount of claims specified in the schedule, and the surplus must be paid to the grantor. *Ib.*
3. The non-assenting creditors cannot claim this surplus, because they would then receive the same benefit under the deed as the assenting creditors, without complying with its terms, which would destroy a material stipulation of the deed, and defeat one of the principal inducements to its execution. *Ib.*

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1. An attorney, who has a claim for collection, cannot, without the authority of his client, take a bond or anything else but money, in satisfaction of the debt. *Kent* vs. *Ricards*, 392.
2. But the power of the attorney over the conduct of the cause, is coextensive with that of his client; he may agree not to demand a judgment, or stipulate for a *cessat executio*, and any violation of this agreement will give the opposite party title to relief, as if the agreement was made with the express authority of the client. *Ib.*
3. When an appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party, and whatever is done in the progress of the cause by such attorney, is considered as done by the party, and binding upon him. *Ib.*
4. The plaintiff's attorney agreed with defendant, *first*, that the suit should not be further prosecuted until there was an ascertained deficiency in certain assignments which he received from the latter, to pay the claim against him. *Secondly*, when judgment was entered, he agreed with defendant's attorney that it should be stricken out, if objected to by defendant. And *thirdly*, when so objected to, he assured defendant the judgment should make no difference in the collection of the debts assigned, and that no execution should be issued upon it until such debts could be collected. HELD—

   That it was clearly within the scope of the authority of the attorney to make this agreement, and equity will interfere by injunction, to prevent the premature enforcement of the judgment. *Ib.*
5. An administratrix employed an attorney to collect certain claims due the estate of the intestate; and suits were instituted upon some, and judg-

ATTORNEY, POWERS OF, &c.—*Continued.*

ments recovered upon others, when she died, and the claims were passed to the administrator *d. b. n.* HELD—

That under such circumstances, the administrator *d. b. n.* has the right to change his attorney; but the commissions should be equally divided between the attorney first employed and the one who may collect the money. *Notley Young's Estate*, 461.

AUDITOR'S ACCOUNTS AND REPORTS.

See PRACTICE IN CHANCERY, 1.

BILLS OF REVIEW.

1. If a decree be enrolled so that the cause cannot be reheard upon petition, there is no remedy but by a bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter discovered since. *Ducker* vs. *Belt*, 13.

See PRACTICE IN CHANCERY, 37, 67.

BOOKS AND PAPERS, PRODUCTION OF, &c.

See PRACTICE IN CHANCERY, 58 to 60.

CASES EXPLAINED OR OVERRULED.

1. The case of *Stevens* vs. *Gregg*, 10 *G. & J.*, 143, is not in conflict with this case; the controversy in that case was between pecuniary legatees and the devisee of the real estate, and the legacies were not charged upon the land. *Mitchell* vs. *Mitchell*, 71.

2. The circumstances of this case are distinguishable from those of the case of *Dugan et al.* vs. *Gittings et al.*, 3 *Gill*, 138, in essential particulars; there being here no legal testimony of mutual promises to marry, and none to bind the husband to the terms of the agreement as stated by the wife, and no clear evidence that the property was delivered in pursuance of the agreement. *Gough* vs. *Crane*, 119.

CHARGES UPON LANDS DEVISED.

1. Testator, by his will, made in 1825, desired his son to release an undivided interest in certain land which the son held in common with his sister, to the latter, "or, in lieu thereof," pay to his sister $5,000, and "with the payment of which, in case of his refusal or omission to release," as aforesaid, he "charged that portion of his estate" devised to his son. The son accepted the devise, and died in 1837 without executing the release, and thereupon his sister became entitled both to the land charged, and that required to be released by the will; there was some evidence also that she enjoyed in the lifetime of her brother the beneficial use of the land to be released. Upon a bill filed by the sister, in 1846, to recover this sum of $5,000 from the general personal estate of her brother, it was HELD,—

   1. That, under these circumstances, this claim is *strictissimi juris*, and should be made out in a very clear and satisfactory manner.
   2. That the terms of the will are too clear and direct to leave any doubt upon the subject of the existence of the charge upon the land devised to the son.
   3. That this charge was extinguished by the descent of the title to the land upon the sister, in whose favor the lien was created.
   4. That by accepting the devise, the son became personally bound for the payment of the charge, if he refused or omitted to make the relinquishment required of him.

CHARGES UPON LANDS DEVISED.—*Continued.*

5. That, though thus personally bound, the land devised was the primary fund for the payment of the charge, the personal responsibility being only a collateral security, and the charge upon the land being destroyed by the union of the title and charge in the sister, she cannot have recourse to the personal estate of the brother to recover this charge. *Mitchell* vs. *Mitchell*, 71.

2. The son became liable only in respect to the land devised to him, and even his personal contract to pay the money would not, in case of this death, shift the primary liability from the real to the personal estate. *Ib.*

3. Where land subject to a mortgage or charge, descends to or is purchased by a party, who dies, leaving the debt unpaid, the land is the primary fund for the payment of the debt, even though the purchaser covenanted to pay it, such covenant being regarded only as additional security. *Ib.*

4. The primary responsibility of the personal estate in general cases results from the fact that the contract is primarily a personal contract, the personal estate receiving the benefit, and hence the land is bound only in aid of the personalty. *Ib.*

5. The case of *Stevens* vs. *Gregg*, 10 *G. & J.*, 143, is not in conflict with this case; the controversy in that case was between pecuniary legatee and the devisee of the real estate, and the legacies were not charged upon the land. *Ib.*

6. The personal estate is the natural and primary fund for the payment of debts and legacies, even where they are charged upon the land devised or descended, and the real estate is only an auxiliary fund after the personalty is exhausted. *Ib.*

7. A testator devised two tracts of land to his son in fee, upon condition that he shall keep and maintain his mother during life: "and it is moreover my desire that my said son do and shall provide for my daughters, Elizabeth and Susan, good and sufficient boarding, and comfortable clothing, so long as they may remain single." HELD,

That this was a charge upon the *whole* real estate devised to the son, and that the daughters of the testator are entitled to a reasonable annual allowance for their board and clothing, or a gross amount in commutation thereof, out of the proceeds of the sale of the land. *Hutchins* vs. *Hutchins*, 356.

8. This annual allowance is not to be made out of the profits of the estate, in common with the devisee and his family, nor are the daughters to be limited to a proportion of the interest on the proceeds of the sale. *Ib.*

See WILLS, &c., 1. TRUSTS, &c., 5.

CHOSES IN ACTION.

See HUSBAND & WIFE, 5, 6, 7. PART PERFORMANCE, 1, 9. JURISDICTION, 2.

CODICIL.

See WILLS, &c., 5 to 10.

COMMISSIONS.

See COMMISSIONS TO TRUSTEES. ATTORNEY, &c., 5.

COMMISSIONS TO TRUSTEES.

1. When trustees are compelled to bring suit for the purchase-money, it has been the constant practice of the Court to allow a commission of 5 per cent. to the attorney engaged by them, and when the trustee is himself

COMMISSIONS TO TRUSTEES.—*Continued.*

an attorney, and collects the money in that capacity by a suit at law, a similar allowance has always been made to him.—*Farmers' Bank*, vs. *Martin & Travers*, 224.

2. Such commission, as well as the trustee's commission as such, and the costs of suit, are always deducted from the proceeds of sale before distribution is made among creditors, the effect of which is, of course, to throw these allowances upon the unpreferred creditors, when the fund is insufficient to pay all. *Ib.*
3. Such commissions will also be allowed to the trustee, where he proceeds to collect the purchase-money by proceedings for a re-sale in the same case. *Ib.*
4. The trustees for the sale of mortgaged property postponed the sale, at the request of the owner of the equity of redemption, who stipulated that they should be allowed commissions and expenses for such postponed sale. HELD,

That this was a *personal* contract with the party, and gave the trustees no right to claim such commission out of the proceeds of sale. *Neptune Insurance Co.* vs. *Dusey*, 334.

CONCURRENT JURISDICTION.

See PRACTICE IN CHANCERY, 31.

CONDITION PRECEDENT.

See DEEDS, CONSTRUCTION OF, &c., 1 to 4.

CONDONATION.

See DIVORCE, 3.

CONSIDERATION IN DEEDS.

See FRAUDULENT CONVEYANCES, 3, 4, 5, 15 to 19, 22 to 25.

CONSTITUTIONAL LAW.

1. The 23d section of the 4th article of the new Constitution, prohibits the origination of "new business" in the Court of Chancery, after the adoption of that instrument by the people. A cause in lunacy was depending in the Court before, and the lunatic died after, such adoption. A petition was then filed by parties in interest for the appointment of a receiver, upon the ground that there was a contest in the Orphans Court respecting the will of the lunatic, and delay would occur before any one entitled to the estate would appear. HELD,

That it is a question not free from doubt, whether such petition be not *new business* in the sense of the Constitution, though the Chancellor inclines to think that, under the peculiar circumstances of this case, the Court had the power to appoint the receiver for the temporary purpose of holding and preserving the property, until some person entitled to receive it should appear, and passed an order accordingly. *In Re Rachel Colvin, a lunatic*, 278.

CONSTRUCTION OF ACTS AND STATUTES.

1. The Act of 1833, ch. 181, contemplates that the proceedings upon mortgages taken under it should be *ex parte*, until after the decree and sale, and that the propriety of the decree and the validity of the sale may be inquired into and contested after the order of ratification *nisi*, and before the final order. *Eichelberger* vs. *Harrison*, 39.
2. The devise in this case being not of lands, but of their rents and profits,

CONSTRUCTION OF ACTS AND STATUTES.—*Continued*,

and the intent of the testator being manifest upon the face of the will that the land should not pass, the Act of 1825, ch. 119, does not apply. *Boyle* vs. *Barker*, 42.

3. That Act applies to devises of lands or real property in general terms, without words of perpetuity, or limitation, and gives the entire estate and interest of the testator, unless by devise over, or by words of limitation or otherwise, a contrary intention is indicated. *Ib.*
4. Mere petulance and rudeness, and sallies of passion, are not sufficient to constitute "cruelty of treatment," within the meaning of the Act of 1841, ch. 262; there must be a series of acts of personal violence, or danger of life, limb, or health, to authorize a divorce *a mensa*. *Bowic* vs. *Bowic*, 51.
5. The Act of 1785, ch. 72, which authorizes the real estate of a deceased debtor to be sold to pay his debts, when the personalty is insufficient, does not require that such debtor should die *seized* of the real estate proposed to be sold; the words of the Act are, if he "shall *leave real estate* which descends," &c. *Robertson* vs. *Parks*, 65.
6. Though the Act of 1841, ch. 163, does not apply to the Court of Chancery, or require objections to the jurisdiction to be made at any particular stage of the case, yet its policy and the manifest justice of the provision, may have influence when a question not free from difficulty is presented. *Gough* vs. *Crane*, 119.
7. Under the Act of 1841, ch. 262, and its supplements, alimony is an incident to the power of granting divorces, and cannot be awarded to the wife except as a consequence of the exercise of such power. *Dunnock* vs. *Dunnock*, 140.
8. But the Act of 1777, ch. 12, sec. 14, giving the Chancellor as full authority in cases of alimony as the Ecclesiastical Courts have in England, is not repealed by the Act of 1841, ch. 262. *Ib.*
9. The Act of 1841, ch. 163, is confined in its operation to the Appellate Court, and the Court of Chancery may, *sua sponte*, refuse relief if it appear from the proceedings that it has no jurisdiction, though the defendant does not make the objection by the pleadings. *Ib.*
10. To avoid a deed under the Insolvent Acts of 1812, ch. 77, and 1816, ch. 221, it is not enough that the grantee was insolvent at the date of its execution, and that the grantee knew of such insolvency; but it is indispensable that the undue preference should be given "with a view, or under an expectation at the time, of taking the benefit of the insolvent laws." *Falconer* vs. *Griffith*, 151.
11. The 1st sec. of the Act of 1834, ch. 293, is local in its operation, and confined to the City and County of Baltimore, and its proviso prevents its application to cases where the grantee had not notice of the insolvent condition of the grantor. *Ib.*
12. The 2d sec. of the Act of 1845, ch. 139, condemns transfers though made at the request or on the demand of the creditor; but allows them to stand, unless made with a view and under an expectation of taking the benefit of the insolvent laws, as required by the Acts of 1812 and 1816; and where this intent is denied by the answer, the plaintiff must prove it. *Ib.*

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*

13. A mortgage was executed to a manufacturing company, and the affidavit required by the 1st section of the Act of 1847, ch. 271, was made by the agent and treasurer of the Company. HELD—
    That this was a sufficient compliance with the provisions of that Act. *McKim & Kennedy* vs. *Mason*, 186.
14. A woman died intestate, leaving an illegitimate son and other children born in lawful wedlock. HELD—
    That by the Act of 1825, ch. 156, the illegitimate son was entitled to share equally with the other children in the mother's estate. *Earle & McNier* vs. *Dawes*, 230.
15. The evident intention of the 7th section of the At of 1829, ch. 216, which makes releases, executed by a female ward of the age of eighteen to her guardian, as valid as if she was of full age, was that the release should be a release executed to him *who had been* guardian, but whose office had ceased by the arrival of the female to the age of eighteen. *McClellan* vs. *Kennedy*, 234.
16. It is not necessary that the party who applies to this Court to order a demise under the 5th section of the Act of 1831, ch. 311, should be the tenant in possession: the tenant of any particular estate, of full age, whether in possession or not, may apply under that section. *Hitch* vs. *Davis*, 262.
17. The Act of 1763, ch. 23, only confers the right to make the assignment authorised by it, upon the original creditor, and not upon the assignee of such creditor. *Neptune Ins. Co.* vs. *Dorsey*, 334.
18. The Act of 1831, ch. 205, sec. 3, authorizing bonds of conveyances to be recorded, does not, nor was it intended to, touch *conveyances* of the title, either legal or equitable; its object and effect is simply to authorize the registration of contracts to convey, and not conveyances. *The U. S. Ins. Co.* vs. *Shiver, et al.*, 381.
19. When a creditor proceeds under the 9th section of the Act of 1842, ch. 293, to reach the property of a married woman, he must show that she earned it by her skill, industry, or personal labor, and must prove his claim according to the course of the attachment law, proceeding by way of attachment from the County Court. *Crane* vs. *Seymour*, 483.
20. The questions of fact and of law which may arise under this act, and the proceedings it authorizes, are intended and peculiarly fitted for decision by Courts of law aided by juries. *Ib.*
21. A peculiar and special mode of proceeding, to be pursued by creditors who attempt to reach the property of married women under this Act, is prescribed by the Act itself, and to this mode creditors are restricted. *Ib.*
22. The proviso to the 2d section of the Act of 1825, ch. 203, that the grantee shall not have the benefit of the recording of a conveyance which, by any other instrument or writing, appears to have been intended only as a mortgage, unless such other instrument be also recorded therewith, does not apply to the case of a deed absolute upon its face, and where no other instrument was executed, though it was intended merely as a security for money loaned. *Ing* vs. *Brown & Brannan*, 521.

See MECHANIC'S LIEN, 2, 4, 5, 6.
HUSBAND AND WIFE, 6.
APPEAL, 3.

CONSTRUCTION OF ACTS AND STATUTES.—*Continued.*
REGISTRATION OF DEEDS, &c., 9, 10.
MORTGAGE, &c., 6, 7.
CONSTRUCTIVE NOTICE.
See REGISTRATION OF DEEDS, 2, 7, 8.
MECHANIC'S LIEN, 7 to 9.
HUSBAND AND WIFE, 14.
CONTRACTS, CONSTRUCTION OF, &c.
1. The words "more or less," or other equivalent words, used in contracts and conveyances, should be construed to qualify the representation of quantity, in such a manner, that if made in good faith, neither party should be entitled to any relief, on account of a deficiency or a surplus. *Hurt* vs. *Stull*, 24.
2. In a contract for the sale of land for a gross sum, in which, by the introduction of the words "more or less," the representation of quantity is qualified, the number of acres is to be considered as merely descriptive, and not of its essence, and, in the absence of fraud, deficiency or surplus in the quantity of land, will not avail to vacate the contract. *Ib.*
3. There may be, however, cases in which the deficiency, from its magnitude, would raise a presumption of fraud, imposition or mistake, and in such cases, the words "more or less," would not be permitted to stand in the way of relief. *Ib.*

See PARTNERSHIP, PARTNERS, 4, 5.
CONVERSION OF REALTY INTO PERSONALTY.
1. Where land is sold under the Act to direct descents, or by a trustee under the Act of 1785, ch. 72, for the purposes of partition, or for the payment of debts where the personal estate proves insufficient, the mutation from realty to personalty is not effected until the sale has been finally ratified, and the purchaser has complied with the terms of it. *Betts* vs. *Wirt*, 113.
2. The ratification of the sale, and compliance with the terms of it by the purchaser, when done, do not relate back and work a conversion from the day of sale. *Ib.*
3. The doctrine of relation does not apply to such a case; this doctrine is founded upon a principle of equity, and is never admitted to prevail unless required to advance the purposes of equity. *Ib.*
4. Patents of lands relate back to the certificate, so as to overreach prior grants, only when the holder of the prior certificate has a superior equity. *Ib.*
5. As between the heirs-at-law, and the next of kin, the superior equity cannot be with the latter; the policy of the law is to permit the estate to descend in the line of the ancestor from whom it came, and the inclination of the courts should be in favor of the heir. *Ib.*

COPIES.
See REGISTRATION OF DEEDS, 6, 8.
CORPORATIONS.
See NOTICE TO.
MERGER, 2 to 5.
PRACTICE IN CHANCERY, 66.
COVENANT.
See MORTGAGE, &c., 4.
VENDOR, VENDEE, 1.

CREDITORS.

See FRAUDULENT CONVEYANCES.
ASSIGNMENTS IN FAVOR OF.
SEPARATE PROPERTY OF MARRIED WOMEN.

CREDITOR'S BILL.

1. Where a creditor's bill, besides the averments of the indebtedness of the deceased debtor, and that he left no personal estate, alleges that no letters of administration had been granted thereon, the admission of this allegation in the answer dispenses with the necessity of producing the proof that would be otherwise required. *Robertson* vs. *Parks*, 65.
2. A debtor being entitled to the remainder in certain real estate, after the determination of a life estate of his mother therein, died during the lifetime of his mother; HELD—
   That his interest in this land could be sold for the payment of his debts, the personalty proving insufficient. *Ib.*
3. The Act of 1785, ch. 72, which authorizes the real estate of a deceased debtor to be sold to pay his debts, when the personalty is insufficient, does not require that such debtor should die *seized* of the real estate proposed to be sold; the words of the Act are, if he "shall *leave real estate* which descends," &c. *Ib.*
4. A creditor's bill, after averring that the deceased debtor was in his lifetime seized of certain real estate, devised to him by his father, subject to a life estate of his mother therein, and that he died before his mother, leaving no personal property, alleged that the complainant is entitled to have his debt paid out of the real estate of the debtor in the hands of his heirs, or to which he may be entitled in remainder, as aforesaid; HELD—
   That this allegation was sufficient to entitle the complainant to a decree for the sale of such real estate. *Ib.*

CRUELTY OF TREATMENT.

See DIVORCE, 1, 2, 5.

DECLARATIONS AND ADMISSIONS.

See EVIDENCE, 3, 4, 7, 8, 9.

DEEDS, CONSTRUCTION OF, &c.

1. A deed recited that the grantor was anxious to secure to the grantee his undivided interest in certain land, upon condition that he was to retain the use and enjoyment of it during his life, and in consideration of these premises, and of natural love and affection, conveyed the property to the grantee upon condition that the grantor died before the grantee, and not otherwise, with *habendum* to the grantee and her heirs, subject to the condition aforesaid. The grantor survived the grantee. HELD—
   That this was clearly a condition *precedent*, and not being fulfilled, nothing passed by the deed. *Earle & McNier* vs. *Dawes*, 230.
2. Whether a condition be precedent or subsequent, is always a question of intent, and it is immaterial where the clause creating the condition be placed in the deed. *Ib.*
3. Conditions precedent must be punctually and literally performed before the estate can vest. *Ib.*
4. A Court of Equity will never vest an estate where, by reason of a condition precedent, it will not vest at law. *Ib.*

See REGISTRATION OF, ASSIGNMENTS IN FAVOR OF CREDITORS.

DEFICIENCY IN LAND SOLD.
See CONTRACTS, &c., 1, 2, 3.
DELIVERY.
See DONATIO MORTIS CAUSA, 1, 2, 3.
DEMISE.
See PRACTICE IN CHANCERY, 39, 40, 41.
DEMURRER.
See PRACTICE IN CHANCERY, 20, 21.
MULTIFARIOUSNESS.
JURISDICTION, 6,
DESCENTS.
See REMAINDERMEN.
DEVISE.
See WILLS, &c.
DISTRIBUTION.
See INFANCY, INFANTS, 6.
DIVIDENDS ON STOCKS.
1. Where stocks are sold before the dividends are declared, the latter pass by the sale and transfer to the purchaser. *Abercrombie* vs. *Riddle*, 320.
2. The stocks in this case were sold shortly before the day for declaring dividends had arrived. This sale was made by consent of all parties, including the assignee of the life interest in them. HELD—
That the assignee was not entitled to any allowance out of the proceeds of sale, on account of dividends which had accrued up to the day of sale. *Ib.*
3. The hypothesis, that the value of the stock was enhanced in precise proportion to the amount of the dividends which had accrued up to the day of sale, rests upon a foundation of too much uncertainty, to justify the Court in making it the basis of its judgment. *Ib.*
DIVORCE.
1. Mere petulance and rudeness, and sallies of passion, are not sufficient to constitute "cruelty of treatment," within the meaning of the Act of 1841, ch. 262; there must be a series of acts of personal violence, or danger of life, limb, or health, to authorize a divorce *a mensa*. *Bowie* vs. *Bowie*, 51.
2. Where a husband inflicts blows and other personal violence upon his wife, and by such violence and threats places her in fear for her life, and obliges her to fly from him to avoid serious injury, such conduct constitutes "cruelty of treatment;" and the fact that it was the result of intemperance on the part of the husband, in no way diminishes the title of the wife to relief. *Ib.*
3. There is a difference between condonation of the husband, and of the wife. A much less stringent rule applies to the latter than to the former, because the wife may find it difficult to quit the husband's house, or withdraw from his bed, and she must submit to necessity; circumstances which do not apply to the husband. *Ib.*
4. Yet, after the parties have become reconciled, the Courts are averse to reviving or listening to old grounds of complaint, which had better be forgotten, as well as forgiven. *Ib.*
5. A separation occurred in 1847, in consequence of the cruel treatment of the

DIVORCE.—*Continued.*

husband. The parties afterwards became reconciled, and lived together. The property upon which the parties lived was settled upon the wife and her children, by the will of her father, in such manner that the husband could not deprive the wife entirely of the beneficial enjoyment of it. The parties were married in 1824, and had raised a large family; and there was no proof of cruel treatment since 1847. HELD—

That, under these circumstances, it would not be proper to decree a separation. *Ib.*

6. The marriage relation is not to be dissolved upon slight grounds; and parties will not be released from the duties and responsibilities it imposes, merely because there may be some want of congeniality in their tempers and dispositions. Public policy and morality alike condemn partial dissolutions of the matrimonial union. *Ib.*

See ALIMONY.

DONATIO MORTIS CAUSA, AND INTER VIVOS.

1. It is essential to the validity of both a *donatio inter vivos*, and a *donatio mortis causa*, that there should be a *delivery* according to the manner in which the particular thing, the subject of the gift, is susceptible of being delivered; but this delivery need not be proved by witnesses who actually saw it done, but it may be inferred from facts and circumstances. *Hitch* vs. *Davis*, 266.
2. The donor must part with the legal power and dominion over the subject of the gift: if he retains the dominion, and if there remains to him a *locus penitentiæ*, there cannot be a perfect and legal donation, and that which is not a good and valid gift at law, cannot be made good in equity. *Ib.*
3. A promissory note, payable to the order of the testator, which was never endorsed by him, but which he retained during his life, and after his death was found in possession of his executor, was claimed by his daughter, as a gift, upon the ground that he had given it to her, but had retained it in his possession as her agent, to collect the interest thereon for her, which he regularly paid over to her during his life. HELD—

That whatever may have been the *intention* of the testator, he had not *executed* it in the mode recognised by law to the perfection of a parol gift, not having parted with his legal power and dominion of the subject of the gift, which is therefore void in law, and equity will not make it good. *Ib.*

DOWER.

1. A husband purchased land, in 1832, during coverture, and took a bond of conveyance from the vendor, and the purchase-money having been paid, the legal title was conveyed to him in 1843. In 1839, he sold and executed a bond of conveyance conditioned to convey, free of incumbrance, on payment of the purchase-money. He died in 1848, never having executed a conveyance, the purchaser not having paid the purchase-money. HELD—

That his widow was entitled to dower in this land. *Bowie* vs. *Berry*, 359.

2. Where a husband holding an equitable title parts with it, or it is sold by his creditors during his lifetime, the wife is not entitled to dower, but there is no case which decides that a mere executory contract will have this effect. *Ib.*

DOWER.—*Continued.*

3. It may be that an agreement to convey *before* dower attaches, will in equity defeat dower, but it has never been held that a mere *agreement* to convey after the inception of the title to dower, will do so. *Ib.*
4. The claim to dower is always a favored one; it is a legal right, and if the wife accept a devise from her husband in lieu of it, she is a purchaser of the thing devised for a fair consideration. *Ib.*
5. The estate of the wife does not take effect out of the ownership of the party assigning the dower, but it is regarded as a continuation of the estate of the husband, and there is no *mesne seisin* between the husband and the wife. *Ib.*
6. A part of the money received by the husband from his vendee was applied by him in payment for the land. HELD—
   That this sum must be deducted from the value of the land at the death of the husband, before dower is assigned; the vendee to that extent occupies by substitution the place of the vendor of the husband, but he cannot set off this sum against the dower. *Ib.*
7. The wife, in the assignment of dower as against the vendee of her husband, will be excluded from the value of improvements resulting from the actual labor and money of such vendee. *Ib.*
8. A widow is not entitled to dower in an equitable estate held by the husband during coverture, unless he also *dies*, the owner of such estate, and if he parts with it during marriage, though without the concurrence of the wife, she will be deprived of her dower. *Purdy* vs. *Purdy*, 547.
9. Land was purchased by four brothers, and the title conveyed to but two of them, who, on the same day, mortgaged it to the Bank for money loaned for the payment of the purchase-money. The two to whom the title was not conveyed, paid their share of the debt to the Bank, but there was still a balance due on account of the whole debt, and the Bank still held the mortgage, when one of said two died. HELD—
   That his widow was not entitled to dower. *Ib.*

See INFANCY, INFANTS, 3.

ENROLMENT.

See PRACTICE IN CHANCERY, 2, 3, 36, 37, 67.
REGISTRATION OF DEEDS, 4, 5.

EQUITY OF REDEMPTION.

See MORTGAGE, &c., 14, 15.

EVIDENCE.

1. Accounts settled in the Orphans' Court are *prima facie* evidence in suits relating to the matters contained in them, and he who disputes their correctness has the *onus* upon him of proving their falsity. *Mitchell* vs. *Mitchell*, 71.
2. A cross-interrogatory by the plaintiff, after referring to the previous statement of the witness, that he had given a bond of conveyance to the son, asked, "when he gave it, and in whose possession it is at this time?" In reply, the witness says, "he does not know; the bond will speak for itself; that it was and supposes now is, in possession of his son's counsel." HELD—
   That this did not prevent the plaintiff from excepting to parol proof of the date and contents of the bond, and that such exception should be sustained. *Bullett* vs. *Worthington*, 99.

EVIDENCE.—*Continued.*

3. Declarations of the lady made in the absence of the intended husband are not admissible to prove the agreement to marry. *Gough* vs. *Crane*, 119.
4. Declarations of the lady made in the absence and out of the hearing of the intended husband, to the effect that they had made an agreement, that the husband was to "have all her bonds" and "to allow her the interest on them during her life," are not admissible to bind the husband. *Ib.*
5. Where a paper is never produced, nor its absence accounted for, its contents cannot be proved by parol. *Dunnock* vs. *Dunnock*, 140.
6. The grantor in the deed was indebted to a partnership firm, which was indebted to G., one of the partners. G. purchased the property conveyed by the deed, and it was agreed that the purchase-money should be charged on the books of the firm to G. and credited to the grantor, which was done. HELD—
   That K., another partner of the firm, was a competent witness for G. in a suit by which the validity of the deed was attacked by the creditors of the grantor. *Falconer* vs. *Griffith*, 151.
7. Declarations of a grantor made since the execution of a deed, are inadmissible to impair the rights of parties claiming under it. *Gaitler* vs. *Gaitler*, 158.
8. Declarations of a deceased attesting witness to a will, respecting the incapacity of the testator at the time of its execution, are admissible in evidence against the will, where the validity of the will is the question to be tried. *Ib.*
9. But the declaration of a deceased attesting witness as to the contents and operation of the will are inadmissible; the will must speak for itself: nor are they admissible to show that a fraud was practised upon the testator in obtaining the will. *Ib.*
10. Parol evidence is inadmissible to show that the draftsman of the will was mistaken, and the testator designed something not fully expressed. *Ib.*
11. Official copies of deeds taken from the records, are *prima facie* evidence of everything necessary to the validity of the instruments. *Cole* vs. *O'Neil*, 174.
12. Accounts of a guardian, passed by the Orphans' Court, admitting an indebtedness to his ward, are *prima facie* evidence of such indebtedness against the grantees of the guardian claiming under a deed executed by him subsequent to the passage of the accounts. *McClellan* vs. *Kennedy*, 234.
13. Accounts settled by an executor or administrator in the Orphans' Court, are *prima facie* correct, and it is incumbent on him who disputes them to point out and make manifest the error. *O'Hara* vs. *Shepherd*, 306.
14. When a claim is founded upon a lost instrument, evidence of the loss must be first offered, and then a copy, or parol evidence of its contents, may be used: the existence of the original must be first proved before a copy is admissible. *Young & Wife* vs. *Mackall, et al.*, 398.
15. Where proof is taken, under an order of Court, and the notice was, that depositions would be taken on a certain day at a certain place, and they do not appear upon their face to have been taken at the *place* designated, they are not admissible in evidence. *Ib.*
16. It is a settled principle, in this State, that the receipt in a deed is only

EVIDENCE.—*Continued.*

prima facie evidence of the payment of the purchase-money, and may be explained or contradicted by parol. *Spalding* vs. *Brent et al.* 411.

17. Such receipts are inserted more for the purpose of showing the actual amount of consideration, than its payment; and if the money is not paid, they are intended to mean, that the specified amount had been assumed by note, or otherwise. *Ib.*
18. The fact that the grantor has in his possession a single bill of the grantee, given to secure the payment of the purchase-money for the land conveyed, is sufficient to countervail the receipt in the deed. *Ib.*
19. Where a deed is not attacked upon the ground of fraud, accident, or mistake, parol evidence is inadmissible to add to, vary, or change its terms. *Notley Young's Estate*, 461.
20. When a deed is impeached for fraud, by disproving the consideration expressed in it, a different consideration changing its character cannot be set up. *Ib.*
21. Where the consideration has not been disproved, parol evidence of the same kind of consideration, differing only in account, may be offered to rebut any imputation of fraud attempted to be cast upon the deed. *Ib.*
22. A vendee who has sold the land, is a competent witness for his vendor in a proceeding by the latter against the purchaser to enforce the vendor's lien, to show that the purchaser had notice of such lien. *Ringgold* vs. *Bryan*, 488.
23. Parol evidence is admissible to show that an absolute conveyance was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud or mistake. *Bank of Westminster* vs. *Whyte*, 508.
24. But unless accident, fraud, or mistake can be shown, or in cases of trusts, parol evidence cannot either at law or in equity be admitted to contradict, add to, or vary the terms of a will, deed, or other instrument. *Ib.*

See REGISTRATION OF DEEDS, 6, 8.
PRACTICE IN CHANCERY, 13, 25.
PART PERFORMANCE, 5, 9.
SALES BY TRUSTEES, 1, 3.
FRAUDULENT CONVEYANCES, 22, 23, 24.
VENDOR'S LIEN, 1.

EXCEPTIONS TO ANSWERS.

See PRACTICE IN CHANCERY, 17, 19.

EXECUTORS AND ADMINISTRATORS.

See GUARDIAN AND WARD, 8, 11, 15.
EVIDENCE, 13.

EXTINGUISHMENT.

See CHARGES UPON LANDS DEVISED, 1.
MERGER.

FIXTURES.

1. A steam-engine and boiler placed in and affixed to a cotton factory, and constituting a part of the motive power thereof, are fixtures, and, as between mortgagor and mortgagee, belong to the latter, though placed in the building after the execution of the mortgage. *McKim & Kennedy* vs. *Mann*, 186.
2. Where a mortgage contains no express stipulation, one way or the other,

FIXTURES.—*Continued.*

upon the subject, actual fixtures, of course, pass under it, and as to improvements doubtful in their nature, the inquiry is, whether they have become part of the realty? If they have, they must be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment, and they pass by the mortgage. *Ib.*

3. A mortgage was executed of the real estate of a manufacturing company, consisting of land and the buildings thereon, without any express stipulation as to fixtures. HELD—

That machinery subsequently placed in the buildings, so as to become fixtures, passed by it, and enured to the benefit of the mortgagee. *Ib.*

4. Machinery in a cotton mill, used for the purpose of manufacturing cotton, such as looms, cards, spinning-frames, speeders, &c., and fastened to the building so as to secure their uniform and steady operation, are not fixtures. *Ib.*

5. As between mortgagor and mortgagee, if the annexation be such as to make it impossible to disunite the personal from the real estate without injury to both, and especially without injury to the latter, the personal will be regarded as real estate, though not affixed *perpetui usus causâ*. *Ib.*

6. As between such parties, the question is, whether the thing so claimed to be a fixture is so attached as to become parcel of the freehold; and this is a question of fact depending on the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them. *Ib.*

7. The ancient rigor of the rule in regard to fixtures has been mitigated in modern times, and the tendency and spirit of recent decisions is to a still greater relaxation, not only as between landlord and tenant, but also as to parties between whom it has hitherto been applied with more strictness. *Ib.*

8. Where the holders of the liens on machinery and fixtures, and on the building, are different parties, and rent has been received for the use of the whole property, by the trustees, before the sale under the decree, in apportioning such rent, there should be given to the holders of the lien on the machinery such proportion as according to proof they would be entitled to in view of the greater wear and tear of the machinery. *Ib.*

FRAUD.

1. It is well established, that fraud may be inferred from facts and circumstances; from the character of the contract, or from the condition and circumstances of the parties. *Davis* vs. *Banks*, 138.

See FRAUDULENT CONVEYANCES.
REGISTRATION OF DEEDS, 1, 14.
HUSBAND AND WIFE, 12.
MORTGAGE, &c., 2.
TRUSTS, 1, 2.
PRACTICE IN CHANCERY, 49.

FRAUDULENT CONVEYANCES.

1. A conveyance, even if for a valuable consideration, is not, under the statute of 13th *Elizabeth*, valid in point of law, from that circumstance alone. It must also be *bona fide*, for if it be with intent to defraud, or defeat cre-

FRAUDULENT CONVEYANCES.—*Continued.*

ditors, it will be void, though there may be a valuable consideration. *Grover* vs. *Grover*, 29.

2. The fraudulent intent must be shown. It is not a thing to be presumed, but must be proved, and by evidence sufficient for the purpose. *Ib.*
3. The fact, that a part of the consideration of a deed from a father to his son was paid in money, though it gives to the deed, in legal contemplation. the character of a bargain and sale, cannot preclude a Court of Equity from looking to the fact, that the difference between the sum paid and the value of the property conveyed, was, in fact, a gift, founded on the consideration of natural love and affection. *Bullitt* vs. *Worthington*, 99.
4. A father conveyed to his son land worth upwards of $20,000. The deed professed to be for the moneyed consideration of $12,000, but only $5,000 was, in fact, paid in money by the son. HELD—

   That this was a voluntary conveyance to the extent of the excess of the value of the land over $5,000. *Ib.*
5. The services rendered by the son to the father, whilst he lived with him, and during his minority, cannot be set up as a part of the valuable consideration of the deed. *Ib.*
6. Indebtment, at the time of the execution of a voluntary conveyance, from a parent to a child, is *prima facie*, though not conclusive, evidence of a fraudulent purpose with respect to prior creditors. *Ib.*
7. But this presumption may be repelled by showing that the grantor or donor, at the time of the gift, was in prosperous circumstances, possessed of ample means to discharge all his pecuniary obligations, and that the settlement upon the child was a reasonable provision, according to his or her condition in life. *Ib.*
8. When the indebtedness of the grantor, and the voluntary character of the deed are established, it is incumbent on the party claiming under the deed to show affirmatively, and by evidence that leaves no reasonable doubt upon the subject, that the grantor did not, by the conveyance, strip himself of the means to pay all his creditors, but that there remains to him abundant resources to satisfy them in full. *Ib.*
9. If there be a reasonable doubt of the adequacy of his means, or if his property be so circumstanced that delays, difficulties, and expense must be encountered before it can be made available to the prior creditors, the conveyance must fall. *Ib.*
10. If the remaining property of the grantor is encumbered, and litigation or difficulties must be encountered before the creditors can realize their claims, they are hindered and delayed, and the presumption against the deed, for want of a valuable consideration, will be fatal to it. *Ib.*
11. Such a deed cannot, however, be impeached, because it may produce inequality among the children of the grantor. *Ib.*
12. In this case, it being proved that, at the date of the conveyance to the son, the father was in embarrassed circumstances, the residue of his real estate being previously encumbered by mortgage, and the conveyance being voluntary, to the extent of near $16,000, the Chancellor decreed that it could not be permitted to stand against prior creditors. *Ib.*
13. A conveyance, though fraudulent as to creditors, is yet good against the grantor and volunteers claiming under him. *Dunnock* vs. *Dunnock*, 140.

FRAUDULENT CONVEYANCES.—*Continued.*

14. At common law, a debtor may secure one creditor to the exclusion of others, either by payment, or a *bona fide* transfer of his property. *Anderson* vs. *Tydings*, 167.
15. Where a deed was executed upon a moneyed consideration of $144, which was paid to the grantor, this constitutes it a deed of bargain and sale, and it may be supported, by showing that it was caused to be made by the grantor, in satisfaction of a debt due from him of an amount equivalent to the value of the property conveyed, this being a consideration, *ejusdem generis*, with that stated in the deed. *Ib.*
16. When a deed purports to be made for a moneyed consideration, it cannot be shown that money did not constitute the consideration, because that would be to change the character of the deed from a bargain and sale to a covenant to stand seized to the use of the grantee. *Ib.*
17. When a deed is charged to be fraudulent, and when the consideration stated in it has not been disproved, evidence of collateral circumstances showing an additional consideration not expressed in the deed, may be received to repel the charge of fraud. *Ib.*
18. In this case, a deed was executed to a married woman, for the consideration of $144, paid to the grantor by the husband. This deed was impeached by the creditors of the husband, on the ground that it was executed in fraud of their rights. HELD—
    That it was competent, in order to meet this charge of fraud, to show that the motive which induced the husband to direct the deed to be executed to his wife, was to satisfy the claims of one of his creditors. *Ib.*
19. To support a deed against the claims of creditors, it must not only be founded on a good or valuable consideration, but it must also be *bona fide;* but when founded on a valuable consideration, the party assailing it must show affirmatively that the design was fraudulent. *Ib.*
20. But a party seeking relief against such a conveyance, need not produce direct evidence of an agreement to defraud the creditors of the grantor; he may prove the fraudulent design by circumstances. *Ib.*
21. A father married his step-daughter on the 26th of February, 1825, and on the 23d of March following, she conveyed to her supposed husband all her property of every description, being a large amount, for a nominal consideration, acknowledging the deed as a *feme sole*, and was described as, H. A. M. "otherwise called" H. A. B. (her maiden name). On the day following, she united with her husband in a deed of the same property to a third person, who on the next day reconveyed to the husband. HELD—
    That these deeds were fraudulent and void. *McClellan* vs. *Kennedy*, 234.
22. A deed for the consideration of $404, expressed upon its face, was attacked by the creditors of the grantor as fraudulent as against them, and it was shown, as a circumstance exciting suspicion of unfairness, that this consideration was totally inadequate to the value of the property. HELD—
    That it was not competent for the grantor to prop up the deed by proof of an indebtedness to the grantee for services rendered as a clerk: such superadded consideration, as far as it goes, destroys the cha-

FRAUDULENT CONVEYANCES.—*Continued.*

racter of the deed, and is inconsistent with the consideration expressed upon its face. *Glenn* vs. *McNeal & Worley*, 349.

23. Such evidence, if admitted, would change the character of the deed from a bargain and sale to a covenant to stand seized to the use of the grantee; but proof of the same kind of consideration, varying only in amount, is admissible. *Ib.*

24. The grantee in a deed absolute upon its face, and professing to be for a moneyed consideration paid at the time, cannot, when such deed is impeached by the creditors of the grantor, show by parol that it was intended to be and was given as a mortgage to secure an old debt of more than twenty years' standing. *Ib.*

25. A deed to be good under the statute of Elizabeth, as against creditors, must be made *both* upon a valuable consideration and *bona fide;* if the intent be to defeat or defraud creditors, it is void, though the consideration may not only be valuable but adequate. *Ib.*

26. A conveyance to a creditor, executed two days before the grantor applied for the benefit of the insolvent laws, when she had stripped herself of all her property, and her creditors were numerous and pressing, is void under the insolvent system. *Ib.*

27. A conveyance is void, as against creditors, under the statute of Elizabeth, unless it be made upon a good consideration and *bona fide*. *Brinton* vs. *Hook*, 477.

28. A voluntary conveyance made by a grantor, not indebted at the time, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. *Ib.*

29. But, if such conveyance was made with a fraudulent intent, and with a view to future debts, it may be successfully assailed by subsequent creditors. *Ib.*

30. A *post nuptial* settlement by the husband upon the wife is good as to subsequent creditors, provided there be no fraudulent intent, and if it be not made with a view to future debts. *Ib.*

31. A grantor conveyed nearly all his property *in trust*, 1st. For the use of the grantor and his wife during their joint lives, with power to them jointly to dispose of it absolutely; 2d. In case he survived his wife, he was to dispose of it at pleasure; 3d. Whether he survived her or not, then to such persons as he by will may appoint, and in case of failure of such appointment, then to his heirs-at-law. HELD—

That this deed is fraudulent and void against the creditors of the grantor, both existing and subsequent, because of the trusts in it in his favor. *Ib.*

See HUSBAND & WIFE, 8, 9, 10.

INSOLVENT DEBTOR, 1, 2.

GENERAL RELIEF.

See PRACTICE IN CHANCERY, 27, 28, 42.

GIFTS.

See DONATIO MORTIS CAUSA.

GUARDIAN AND WARD.

1. Accounts of a guardian, passed by the Orphans' Court, admitting an indebtedness to his ward, are *prima facie* evidence of such indebtedness

GUARDIAN AND WARD.—*Continued.*

against the grantees of a guardian claiming under a deed executed by him subsequent to the passage of the accounts. *McClellan* vs. *Kennedy*, 234.

2. The evident intention of the 7th section of the Act of 1829, ch. 216, which makes releases, executed by a female ward of the age of eighteen, to her guardian, as valid as if she was of full age, was that the release should be a release executed to him *who had been* guardian, but whose office had ceased by the arrival of the female to the age of eighteen. *Ib.*
3. A female ward attained the age of eighteen on the 9th of March, 1834, and on the 12th of the same month she executed a release to her former guardian, who had been deposed from his office nearly nine years before, of all claims she had against him as such guardian. HELD—

   That the authorities which speak of the suspicion and jealousy with which the Courts view transactions between guardians and wards, and others occupying fiduciary relations immediately after such relations are dissolved, do not apply, and the release must be regarded as a free and voluntary act, which she cannot afterwards repudiate. *Ib.*
4. A father married his step-daughter on the 26th of February, 1825, and on the 23d of March following, she conveyed to her supposed husband all her property of every description, being a large amount, for a nominal consideration, acknowledging the deed as a *feme sole*, and was described as, H. A. M. "otherwise called" H. A. B. (her maiden name). On the day following, she united with her husband in a deed of the same property to a third person, who on the next day reconveyed to the husband. HELD—

   That these deeds were fraudulent and void. *Ib.*
5. The property above spoken of was afterwards reconveyed to the wife, and the bill in this case was filed by the ward, who had executed the above-mentioned release, and her husband, against her former guardian, who was also the husband of the wife to whom the property had been so reconveyed, seeking to make that property responsible for her claim. HELD—

   That though the release may have been gratuitously executed, yet she cannot be permitted to repudiate it as against the wife to whom the property, of which she had been unfairly deprived, had been restored. *Ib.*
6. A proceeding to set aside this release, against the guardian alone, to which the wife was not a party, and the decree obtained thereunder, can have no operation as against the wife. *Ib.*
7. If that proceeding was instituted for the purpose of removing the lease out of the way, and subjecting the wife's property to the payment of the ward's claim, it was essential that the wife should have been made a party, and the decree would otherwise, as to her, be fraudulent and void. *Ib.*
8. An administrator, with the approval and sanction of the guardian, loaned a certain sum belonging to his intestate's estate, and the property of the minor, and assigned the mortgage taken for its security to the guardian. The Orphans Court subsequently passed the accounts of the guardian, in which this mortgage was treated as part of the ward's estate. HELD—

GUARDIAN AND WARD.—*Continued.*

That by this action of the Orphans Court, they had given their sanction to this transaction as effectually as if they had previously ordered it, and the administrator is not responsible for loss arising therefrom. *O'Hara* vs. *Shepherd*, 306.

9. By the several Acts of 1798, ch. 101, 1816, chs. 154 and 203, and 1819, ch. 144, the Orphans Courts are empowered to direct the guardians of minors to invest the proceeds of the sales of their real, leasehold, or personal estates in public stocks, or other permanent funds, in the name of their wards. *Ib.*
10. The direction that the securities should be made in the name of the infant, is matter of form, and though very proper to be followed, yet could not have the effect of avoiding the security, if not pursued. *Ib.*
11. By the Act of 1831, ch. 315, the Orphans Courts are authorized to order executors, administrators, and guardians to bring into Court or place in bank stock, or any other good security, any money or funds received by them, and to direct the manner and form in which such investment shall be made. *Ib.*
12. A guardian depositing money in a bank, with the sanction of the Orphans Court, will be protected from loss, though the bank may become insolvent. *Ib.*
13. To any account between the ward and a surety in his former guardian's bond, the principal in that bond, or the trustee of the principal, he being insolvent, is a necessary party. *Ib.*
14. Where the Orphans Court sanctions a loan, the guardian will not be liable for loss, except for subsequent neglect in permitting the property to be wasted, or by some act of negligence, or the want of due dilligence on his part subsequent to the loan. *Ib.*
15. The Orphans Court passed an order directing an administrator to retain in his hands $2,000, as a loan to himself, being the amount of a bond which he had executed to the guardian and the ward, and secured by mortgage. HELD—

That this order was a legitimate exercise of power by the Orphans Court, because it in effect treats the mortgage from the administrator to the guardian as an investment by the latter. *Ib.*

16. Where parties stand to each other in the relation of guardian and ward, or *quasi* guardian and ward, every reasonable intendment should be made for the benefit of the ward, in the construction of transactions or contracts between them, occurring soon after the termination of that relation. *Spalding* vs. *Brent et al.*, 411.

See PRACTICE IN CHANCERY, 48.

HOTCHPOT.

1. The right which the heirs have, that the estate advanced should be brought into hotchpot, is a legal right, and no alienation or incumbrance placed by the heir upon the property given by way of advancement, can defeat it. *Notley Young's Estate*, 461.
2. The insolvency of the personal estate of the ancestor constitutes, in a Court of Equity, no objection to bringing an advancement of personalty into hotchpot with real estate, or the proceeds of real estate. *Ib.*

HUSBAND AND WIFE.

1. Where the aid of a Court of Equity is necessary to enable the husband to obtain possession of the wife's personal estate, he must do what is equitable, by making a suitable provision out of it for her maintenance and that of her children. *McVey* vs. *Boggs*, 94.
2. This principle applies to the assignee, for value, of the husband, to the case of transfers by operation of law, or by the act of the husband, to general assignees for the benefit of creditors. *Ib.*
3. The amount of the provision to be made to the wife in every case must be governed by its peculiar circumstances, and, according to those circumstances, the Court may give to her the whole or only a part of the property. *Ib.*
4. In this case, the husband, though living with the wife, was bankrupt; they were destitute, having no property, except the wife's share of the proceeds in this cause, amounting to $919 06, and had a large number of children, most of them very young and helpless, to support. The Chancellor decreed the *whole* sum to be settled upon the wife. *Ib.*
5. Where the husband neither reduces the *choses in action* of the wife into possession during coverture, nor during his life in case he survives her, they devolve at his death upon her representatives. *Gough* vs. *Crane*, 119.
6. The Act of 1798, ch. 101, sub. ch. 5, sec. 8, changes in this respect the English statute of distributions, which gives to the representatives of the husband who survives his wife, *choses in action* not reduced to possession, to the exclusion of the representatives of the wife. *Ib.*
7. If the husband reduces the *choses in action* of his wife into possession during his lifetime, or recovers judgment upon them at law or in equity, either in his own favor or in favor of himself and his wife, and he survives her, and subsequently dies, they devolve upon his representatives. *Ib.*
8. Though a husband cannot *by will* deprive his wife of her share of his personal estate, yet he has the power to dispose absolutely of such property during his life by sale or gift, and if he reserves no right to himself, the transfer will prevail against the wife, though made to defeat her claim. *Dunnock* vs. *Dunnock*, 140.
9. But if the conveyance or transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her share of his personalty, it will be ineffectual against her. *Ib.*
10. A conveyance of personal property by a husband which would be good against the claim of the wife in case she survived him, is also good against her claim for a living during their separation.
11. A voluntary conveyance by a woman in contemplation of marriage, is avoidable by the husband, from whom it was concealed, or who had no notice of it, as in derogation of his marital rights, and a fraud upon his just expectations. *Cole* vs. *O'Neil*, 174.
12. But it is indispensably necessary to the successful impeachment of such a deed, that the husband should be kept in ignorance of it, up to the moment of the marriage, and even if he be so kept in ignorance, it will depend upon circumstances whether it be valid or not; the question in all such cases is, whether the evidence is sufficient to raise fraud. *Ib.*
13. If it appears that the conveyance was made during the treaty and in con-

HUSBAND AND WIFE.—*Continued.*

templation of marriage, and it does not appear that it was made known to the intended husband, either expressly or by construction of law, he will be presumed to have been ignorant of it, and the *onus* is upon the party claiming under the deed to show affirmatively that he had notice. *Ib.*

14. It is the settled American doctrine that the registration of a conveyance operates as constructive notice upon all subsequent purchasers of any estate legal or equitable in the same property, and it is not easy to suggest a good reason why this doctrine should not apply to the intended husband. *Ib.*

15. Property was settled upon a wife by her first husband for her separate use, free from any control of her husband, with the power of absolute disposition by deed or will. HELD—

That this settlement was operative as against the marital right of a second husband. *Ib.*

16. The protection which Chancery gives to the separate estate of a married woman, with its qualifications and restrictions, attaches to it throughout a subsequent coverture, the principle being that a person marrying a woman so circumstanced is considered as adopting it in the state in which he finds it, and bound in equity not to disturb it. *Ib.*

See FRAUDULENT CONVEYANCES, 18.
PART PERFORMANCE, 1 to 9.
EVIDENCE, 3, 4.
GUARDIAN AND WARD, 4, 5.
MORTGAGE, &c., 5.

ILLEGITIMATE CHILDREN.

1. A woman died intestate, leaving an illegitimate son and other children born in lawful wedlock. HELD—

That by the Act of 1825, ch. 156, the illegitimate son was entitled to share equally with the other children in the mother's estate. *Earle & McNier* vs. *Dawes*, 230.

IMPROVEMENTS, ALLOWANCES FOR.

1. Where a tenant for life puts improvements upon property for the mutual accommodation of himself and those entitled in remainder, and the property is sold to promote the interests of all parties interested, he will be allowed the value of such improvements out of the proceeds of sale. *Gambril* vs. *Gambril*, 259.

2. Though a mortgagee or a tenant in possession may not in all cases be allowed for new improvements, yet a party thinking himself absolutely entitled, who has expended considerable sums in repairs and lasting improvements, will be allowed for such expenditures. *Ib.*

See DOWER, 7.

INADEQUACY OF PRICE.

See SALES BY TRUSTEES, 10.
MORTGAGE, &c., 15.

INCUMBRANCES.

See SALES BY TRUSTEES, 2, 3.

INDEFINITE FAILURE OF ISSUE.

See WILLS, &c., 2, 3, 4, 12, 13.

INFANCY, INFANTS.

1. A female infant, in contemplation of marriage, and with the consent of her intended husband, executed a marriage settlement, conveying her entire real estate to a trustee, in trust for her separate use during coverture, with power to dispose of the same by deed or will, and in case of failure to make such disposal, in trust for any child or children she might thereafter have, and their heirs, &c.; but in case she died without leaving a child or children, or descendants of the same, living at the time of her death, then one-half of said estate for the use of her husband and his heirs, and the other half to her own right heirs. She died during minority, leaving an infant child, who survived her but a few days. HELD—
   That she had not the capacity so to bind her own real estate; but as the conveyance contains provisions beneficial to her, it is *voidable* only, and not absolutely *void*, and can be avoided by her privies in blood, but not by privies in estate only. *Levering* vs. *Levering*, 315.
2. Contracts of an infant for necessaries, are binding, and such as are for his benefit, are voidable only; but a contract that the Court can see, and pronounce to be to the prejudice of the infant, is void. *Ib.*
3. There is no doubt of the power of a female infant to bar herself by her contract before marriage of her right of dower, in her husband's land, and of her distributive share of his personal estate. *Ib.*
4. It is clear, also, that such infant has the power to bind, by a settlement before marriage, her general personal estate, because such personal estate becomes, by the marriage, the property of the husband; and the settlement is, in effect, his settlement, and not hers. *Ib.*
5. The infant himself, when he attains age, or his representatives, privies in blood, can avoid a voidable conveyance, made by the infant; but not privies in estate only. *Ib.*
6. In this case, the settlement being avoided, it was HELD—
   That the estate descended to, and the proceeds of the sale thereof should be distributed among, the uncles and aunts of the infant child, to the exclusion of the children of uncles and aunts. *Ib.*

INJUNCTION.

1. An injunction to restrain proceedings at law for the collection of money due upon notes of hand, given to the vendors for the purchase-money of land, cannot issue without an injunction bond; and where the bill asks for such injunction upon the ground of credits claimed, the amount of such credits should appear, and the balance brought into Court, to be paid to the vendors. *Reynolds* vs. *Howard*, 321.
2. Where such a bill was filed against two only of the five vendors, and the only ground of complaint is the refusal to allow such credits, it cannot be regarded as a bill for the specific performance of the contract of purchase, and the want of necessary parties would forbid the granting of such relief, even if the evidence showed the complainants entitled to it. *Ib.*
3. An injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, in the ordinary course of law. *Herr* vs. *Bierbower*, 456.
4. But if the trespass goes to the destruction of the inheritance, or the mischief be not susceptible of perfect and adequate pecuniary compensation

INJUNCTION.—*Continued.*

at law, or if the acts done or threatened to the property be ruinous, or irreparable, or impair its just enjoyment in future, the Courts of Equity will, without hesitation, interfere by injunction. *Ib.*

5. Taking possession of a portion of a city lot, and digging upon it a foundation, and erecting a building upon such foundation, thereby reducing the front of the lot so as to prevent the plaintiff's building upon it himself in the most advantageous mode, goes to the destruction, *pro tanto*, of the estate, and impairs the just enjoyment of the property in future, and will be restrained by injunction. *Ib.*
6. But the erection of a fence of wood upon a part of such lot, and the admission of such a trespass, does not, *per se*, furnish a sufficient claim to the aid of a Court of Equity, by injunction. *Ib.*
7. This Court has jurisdiction to compel a defendant, by means of an injunction specially worded, to do a substantive act, whether such injunction be merely ancillary to the relief prayed by the bill or the ultimate object of the suit. *Carlisle* vs. *Stevenson*, 499.
8. Unless the trespass goes to the destruction of the inheritance, or the mischief is irreparable, or an injunction is necessary to suppress multiplicity of suits and oppressive litigation, equity has no authority to interfere by injunction. *Ib.*
9. The mere allegation that irremediable injury will result to the complainant, unless protection is extended to him, is not sufficient; the facts must be stated, that the Court may see that the apprehensions of irreparable mischief are well founded. *Ib.*
10. The fact that the injury complained of is one that may be continued, does not prove that it is not susceptible of adequate compensation in damage, by an action at law. *Ib.*
11. The permitting a race or ditch for conducting water to remain out of repairs so that the water filtrates through the bank, thereby flooding and injuring the meadow of the complainant, is not such an injury as will authorize the interference of equity by way of injunction. *Ib.*
12. If actions had been brought at law and damages recovered, and defendant still persisted in permitting the ditch to remain in a defective condition, equity would then interfere by injunction, because it would be shown that the Courts of Law were inadequate to afford relief. *Ib.*
13. If the race was in as good condition as it was during the life of the person under whom both parties claim, or if the injury complained of was caused by the act of complainant himself, he could not have redress in any Court upon any principle. *Ib.*

See ATTORNEY, &c., 4.

PRACTICE IN CHANCERY, 50.

INSOLVENT DEBTOR.

1. To avoid a deed under the Insolvent Acts of 1812, ch. 77, and 1816, ch. 221, it is not enough that the grantee was insolvent at the date of its execution and that the grantee knew of such insolvency; but it is indispensable that the undue preference should be given "with a view, or under an expectation at the time, of taking the benefit of the insolvent laws." *Falconer* vs. *Griffith*, 151.
2. Where a bill attacks a conveyance as fraudulent under these acts, it should

INSOLVENT DEBTOR.—*Continued.*

contain an averment that the undue preference was made with such view and expectation. *Ib.*

3. The 1st sec. of the Act of 1834, ch. 293, is local in its operation, and confined to the City and County of Baltimore, and its proviso prevents its application to cases where the grantee had not notice of the insolvent condition of the grantor. *Ib.*

4. The notice required by this Act to vitiate the conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor; and the plaintiff, where the answer denies it, must prove such actual notice at the date of the deed. *Ib.*

5. The 2d sec. of the Act of 1845, ch. 139, condemns transfers, though made at the request or on the demand of the creditor; but allows them to stand, unless made with a view and under an expectation of taking the benefit of the insolvent laws, as required by the Acts of 1812 and 1816; and where this intent is denied in the answer, the plaintiff must prove it. *Ib.*

6. It is the right and duty of the trustee in insolvency to sell the property of the applicant encumbered by mortgages, and pay off the liens and incumbrances thereon. *Bank of Westminster* vs. *Whyte*, 508.

7. Where the insolvent has made an absolute transfer of property in the nature of a trust, to secure the payment of the money due by him to the grantee, such property must be administered by his trustee in insolvency. *Ib.*

8. The design of the insolvent laws was to secure a prompt, single, and harmonious administration of the estate of the insolvent, which could only be effected by bringing all the parties interested before one and the same tribunal. *Ib.*

See FRAUDULENT CONVEYANCES, 26.

INTEREST ON LEGACIES.

See LEGACY, &c., 1 to 6.

ISSUE.

See WILLS, &c., 2, 3, 4.

JOINT-TENANCY.

It is not sufficient that the words employed would, but for the Act of 1822, ch. 162, be construed to create a joint-tenancy, to create such an estate, unless the instrument *expressly provides* that the land shall be held in joint tenancy. *Purdy* vs. *Purdy*, 547.

JUDGMENTS.

1. A judgment was rendered for the penalty of the bond sued upon, to be released upon payment of such sum, as certain persons named should say was due. HELD—

That this was a final, and not an interlocutory judgment, and could be set up as a claim against the estate of the defendant, though the referees did not ascertain the sum due until after his death. *Young & Wife* vs. *Mackall et al.*, 398.

2. The judgment was final, and to make it absolute, no further action of the Court was necessary: the filing of the certificate of the referees was all that was required for the purpose.

See VENDOR'S LIEN, 4.

JUDGMENT IN REM.

See MECHANICS' LIEN, 6 to 8.

JURISDICTION.

1. The fact that an objection to the jurisdiction of the Court is not made until the hearing of the cause, and after the argument was commenced, though not of itself a sufficient reason for refusing to listen to it, yet in a case where there is doubt upon the question of jurisdiction, is a reason why the Court should lean against the objection. *Gough* vs. *Crane*, 119.
2. In this case the Chancellor decreed the delivery up of the *choses in action* of the wife, and not reduced into possession by the husband in his life-time, to the representative of the wife, he being of opinion that it was not clear that there was plain, adequate, and complete remedy at law, and the objection to the jurisdiction not having been made until the hearing. *Ib.*
3. An action of trover would have given the plaintiff damages only from the demand and refusal, and this would be but a personal demand against the defendants, the executors of the husband, a security which may be much inferior to a decree directing the specific delivery of the bonds. *Ib.*
4. An action of replevin would require the representative of the wife to give bond with surety for a large sum, and the defendants, by a *retorno habendo* bond, would be able to regain the possession, and the plaintiff's claim to the specific thing thus converted to a personal demand on such bond. *Ib.*
5. Though the Act of 1841, ch. 163, does not apply to the Court of Chancery, or require objections to the jurisdiction to be made at any particular stage of the case, yet its policy and the manifest justice of the provision, may have influence when a question not free from difficulty is presented. *Ib.*
6. According to the practice in this State, an objection for the want of jurisdiction may be taken at the hearing, though not presented either by plea, answer, or demurrer. *Dunnock* vs. *Dunnock*, 140.
7. The Act of 1841, ch. 163, is confined in its operation to the Appellate Court, and the Court of Chancery may, *sua sponte*, refuse relief if it appear from the proceedings that it has no jurisdiction, though the defendant does not make the objection by the pleadings. *Ib.*
8. The amount of such credits claimed being less than five pounds, it is not sufficiently large to sûstain the jurisdiction of this Court. *Reynolds* vs. *Haward*, 331.
9. By the Act of 1715, ch. 41, this Court cannot hear, determine, or give relief in any cause, matter, or thing, wherein the original debt or damages does not amount to 1201 pounds of tobacco, or five pounds and one penny in money. *Ib.*

See PRACTICE IN CHANCERY, 32. LUNATIC, LUNACY, 1, 12. INJUNCTION, 7.

LACHES AND LAPSE OF TIME.

See TRUSTS, 4. PRACTICE IN CHANCERY, 5. PARTITION, 2.

LEGACY, LEGATEE.

1. Where no time is fixed by the will for the payment of a legacy, it will bear interest from the expiration of one year after the death of the testator. *Hitch* vs. *Davis*, 266.
2. Where no time of payment is fixed by the will and no interest provided

LEGACY, LEGATEE.—*Continued.*

for by its terms, the rule is irrevocably established that the legacy is not payable until the expiration of one year from the testator's death, and interest does not commence until then. *White* vs. *Donnell & Howard*, 526.

3. But where a legacy is given by a parent to a child, or where the testator stands to the legatee *in loco parentis* and the latter is otherwise unprovided for, then, whether a future time is fixed for the payment or not, interest will be allowed from the testator's death. *Ib.*
4. If other funds are provided for the support of the legatee, then, whatever the relation in which the testator stands to the former, the general rule applies. *Ib.*
5. A direction in a will, that the legacy shall be paid "*forthwith upon the decease*" of the testator, or "*as soon as possible*," is not sufficient to supersede the general rule, that the legacy is payable and bears interest only from the expiration of the year from the testator's death. *Ib.*
6. By the terms of marriage articles, it was provided that "from and immediately after the death" of the intended wife, $20,000 were to be set apart out of the trust estate for the use of her daughter then living, provided she left no other issue living at her death; and if she left such other issue, then one equal child's share of the trust property, provided such share did not exceed $20,000, but only that sum if it did. This sum was to be ascertained and decided in writing by three disinterested persons, to be appointed by the trustee, the daughter, and the intended husband. The wife died on the 25th of April, 1839, during the minority of the said daughter, and leaving other issue, and the $20,000 were set apart for the daughter on the 9th of June, 1842. HELD,

   That under all the circumstances of this case, the daughter was not entitled to interest on this legacy, from the death of her mother. *Ib.*

See CHARGES UPON LANDS DEVISED. WILLS, &c., 1, 2.

LIEN.

See VENDOR'S LIEN. MECHANICS' LIEN. FIXTURES.

LIMITATIONS, STATUTE OF, &c.,

1. An express promise to pay the debt will not revive the remedy, upon a bond barred by the statute; though upon such promise suit may be maintained, and the bond, though over twelve years standing, may be offered in evidence, as the inducement to, or consideration of, the promise. *Young and Wife* vs. *Mackall*, 398.
2. A claim was set up against the proceeds of the real estate of a deceased person, sold for the purpose of partition amongst his heirs-at-law, founded upon two single bills executed by the deceased, and which, at the time of their filing, were barred by limitations. To remove this bar, a bill in equity by the executor of the obligee, and the answer of the deceased admitting the existence of the single bills, and expressing his willingness to settle upon certain conditions, filed more than nine years before the filing of this claim, were offered in evidence. HELD—

   That this was not sufficient to remove the bar of the statute, pleaded by one of the heirs-at-law of the deceased. *Ib.*
3. The action upon a promise to pay a debt, which is barred by the statute, must be in *assumpsit;* and to such an action, three years is a bar. *Ib.*

LIMITATIONS, STATUTE OF, &c.—*Continued.*

3. Trusts, which are not affected by the statute of limitations, are those technical and continuing trusts, which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of Courts of Equity. *Ib.*
4. But where the jurisdiction is concurrent, and the party is at liberty to proceed in either Court, the statute is equally a bar in both; and in all such cases, equity adopts, by analogy, the time prescribed by law. *Ib.*
5. As soon as the cause of action accrues, whether it be the case of a trust or not, if it be a fit subject for a suit at law as well as in equity, the statute of limitations begins to run. *Ib.*
6. The statute may be pleaded, as a defence, at any time after the claim has been filed; or brought before the Court, either before the case has gone to the Auditor, or after he has made a report on it. *Ib.*
7. The plea of limitations only enures to the benefit of the party pleading it. *Notley Young's Estate*, 461.

See PARTITION, 2.

LIMITATION OVER OF PERSONALTY.

See WILLS, &c., 2, 3, 4.

LUNATIC, LUNACY.

1. The authority of the Court of Chancery in this State, to take charge of the estates and persons of idiots and lunatics, is derived from the 6th section of the Act of 1785, ch. 72, which gives the Chancellor full power, in all cases, to superintend, govern, and manage their estates and persons. *In the matter of Rachel Colvin, a lunatic*, 278.
2. The power of appointment of a committee for a lunatic is a discretionary one in the Chancellor, and cannot be reviewed by any other Court, though it should not be exercised arbitrarily or capriciously, and without regard to the wishes or recommendations of those interested in the estate, or who feel an interest in the person of the lunatic. *Ib.*
3. Though the committee is usually appointed on the nomination of the person who sues out the commission of lunacy, yet a *caveat* may be entered against the appointment, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making the selection. *Ib.*
4. Though in this State it is more usual to appoint the same party committee of the person and estate, yet not unfrequently the practice is different, and from peculiar circumstances it is sometimes eminently proper to intrust the person of the lunatic to one committee, and his estate to another. *Ib.*
5. The rule of the Court in making such appointment, other things being equal, is to appoint him who is recommended by the greatest number of those who are entitled to be heard. *Ib.*
6. The will of a lunatic, though made when she was *compos mentis*, and though she may never be restored to mental capacity so as to revoke it, is still, in legal contemplation, ambulatory until her death, and until then can confer no rights, and can have no influence on the Court in appointing her committee. *Ib.*
7. The great and leading object in the selection of persons for the management of the estates of lunatics, and the custody of their persons, is to

LUNATIC, LUNACY.—*Continued.*

advance their welfare and comfort; and the interests of those who may be entitled to the succession is wholly subordinate to this. *Ib.*

8. The law now presumes that the nearest of kin to the lunatic will treat him with more affection than strangers to his blood, and hence consanguinity, though it confers no positive title, is now considered a recommendation in the selection of a committee, and a strong ground must be shown before it will be disregarded. *Ib.*
9. If the person recommended is embarrassed by pecuniary difficulties, and there is any reasonable ground for apprehending that he would be likely to employ the money which may come to his hands as committee, in his own affairs, it would operate with powerful force against his appointment. *Ib.*
10. The death of the lunatic determines the office of the committee, and the only power Chancery retains over the committee, as such, is to compel him to account and deliver possession of the property as the Court shall direct. *Ib.*
11. But the committee is to retain possession and preserve the property until some person shall appear properly authorized to receive it from him; and, in the mean time, if there is reason to apprehend delay in ascertaining who are entitled to the possession, a receiver may be appointed upon application of the parties in interest. *Ib.*
12. The jurisdiction of Chancery in lunacy remains, after the death of the lunatic, only to the extent and for the purpose of having the necessary accounts taken, and directing the fund or estate to be paid over to the party or parties entitled. *Ib.*
13. After the death of the lunatic, Chancery will not administer the fund even for the benefit of creditors; they must pursue their remedies before the ordinary jurisdictions; nor will the Court adjudicate questions of right between opposing claimants. *Ib.*

MACHINERY.

See FIXTURES, 1–8.
MECHANICS' LIEN.

MARITAL RIGHTS OF HUSBAND.

See HUSBAND AND WIFE, 11–16.

MARRIAGE.

See PART PERFORMANCE, 1–4.

MARRIAGE SETTLEMENT.

See INFANCY. INFANTS, 1, 4, 6.
HUSBAND AND WIFE, 15.
LEGACY, &c., 6.

MARRIED WOMEN.

See HUSBAND AND WIFE.
SEPARATE PROPERTY OF.

MARSHALLING OF SECURITIES.

If one party has a lien on, or interest in, two funds for a debt, and another party has a lien on or interest in only one of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties. *The U. S. Ins. Co.* vs. *Shriver et al.*, 381.

MECHANICS' LIEN.

1. Where property on which machinery is constructed is subject to a lien or incumbrance prior to the commencement of the building in which the machinery is placed, the lien of the mechanic must be subordinate to the prior incumbrance. *McKim and Kennedy* vs. *Mason*, 186.
2. Where a mechanic filed his claim against certain parties, and the *scire facias* was issued against them only, and the notice provided for by the 17th section of the Act of 1838, ch. 205, was not given, but waived by consent, the judgments recovered by the mechanic cannot affect the rights or interests of third persons having liens on the property against which the claim was filed. *Ib.*
3. Where a mortgagee purchased the mortgaged premises at the trustees' sale, and took the property wholly discharged from the lien of the mechanic, a purchaser, whoever he may be, from such mortgagee, must take a title equally exempt from the lien. *Ib.*
4. The lien of the mechanic under the Act of 1838, ch. 205, and its supplements, for work and labor and materials furnished, is in subordination to prior incumbrances, but subject to such incumbrances, the mechanic has a lien on the building and the ground covered by it. *Ib.*
5. By the 4th section of the Act of 1845, ch. 176, machines are rendered subject to the lien "*in like manner*" as buildings are made subject thereto by the original Act, and hence the lien of the machinist must be subordinate to prior incumbrances. *Ib.*
6. Proceedings under the lien laws, though in the nature of proceedings *in rem*, are not purely of that character, and unless the notice by advertisement required by the 17th section of the Act of 1838, ch. 205, be given, the judgment must be limited in its operation to the parties warned by the preceding section. *Ib.*
7. But if the proceedings are strictly *in rem*, notice, either actual or constructive, is essential to the validity of the judgment against all the world. *Ib.*
8. Constructive notice is as essential to the validity of a judgment *in rem*, as actual notice is to that of a judgment *in personam ;* a proceeding professing to determine the right of property without notice actual or constructive, is a mere arbitrary edict, not to be regarded anywhere as the judgment of a court. *Ib.*
9. Where a judgment is obtained under the mechanics' lien laws, without notice given as provided by the 17th section of the Act of 1838, ch. 205, a mortgagee of the property, who has no notice, either actual or constructive, would not have the right to appeal from such judgment. *Ib.*

MERGER.

1. Where there is a parol agreement respecting the purchase of lands, and a bond of conveyance is subsequently executed, this merges and extinguishes all previous agreements resting in parol. *Bullett* vs. *Worthington*, 99.
2. Unless there is some provision in the charter to the contrary, a transfer of its own stock directly to a corporation, will operate as a merger of the stock so transferred. *Williams* vs. *The Savage Manuf. Co.*, 418.
3. But it does not follow, that though the shares transferred to the corporation are merged for the time being, they may not be subsequently revived. *Ib.*

MERGER.—*Continued.*

4. Where banks take their own stock in payment of, or in pledge to secure debts due them, it has always been the understanding and practice, that they were authorized to re-issue the stock whenever they thought fit to do so. *Ib.*
5. This Court has the power to order a re-transfer of stock, or the issuing of new shares, where justice between the parties require it, the amount of capital authorized by the charter not being exceeded by such issue. *Ib.*

See CHARGES UPON LANDS DEVISED, 1.

MORE OR LESS.

See CONTRACTS, CONSTRUCTION OF, &c., 1, 2, 3.

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. Upon proper averments and sufficient evidence, a Court of Equity will treat an absolute deed as a mortgage, and decree a redemption by the mortgagor, or a sale for the purpose of paying the sum due. *Davis* vs. *Banks*, 138.
2. Where a bill alleges, that a deed, absolute on its face, was intended to be a mortgage, and was procured with the fraudulent design of setting it up as an absolute deed, contrary to the express agreement and understanding of the parties at the time of its execution, and the answer denies the fraud, the complainant must prove it by evidence, direct or circumstantial. *Ib.*
3. A mortgage was executed to a manufacturing company, and the affidavit required by the 1st section of the Act of 1847, ch. 271, was made by the agent and treasurer of the Company. HELD—

   That this was a sufficient compliance with the provisions of that Act. *McKim & Kennedy* vs. *Mason*, 186.
4. Where a mortgage contains no covenant that the mortgagor shall continue possessed of the land, with power to take the rents, profits, and issues, until default made, he cannot be regarded as the tenant of the mortgagee. *Ib.*
5. A husband executed a mortgage to secure a debt, and after payment thereof the mortgagees were to hold the property, or convey it to the appointee of the grantor's wife, for her separate use; and on the same day, the husband and wife assigned to the same mortgagees the wife's interest in the real estate of her father. HELD—

   That the mortgagees had a perfect right to resort to either, or both of these securities, for the payment of their debt; and all that the wife can demand is, that after payment of their claim, they shall convey to her appointee the property mentioned in the mortgage of the husband. *Notley Young's Estate*, 461.
6. A stipulation in a mortgage to secure a specific sum, that it should cover such further sum as might become due the mortgagees for costs, charges and commissions, is not effectual since the Act of 1825, ch. 50. *Ib.*
7. The policy of that Act is, that the utmost extent to which the mortgaged premises can be made liable, must appear upon the face of the instrument; and provisoes that the mortgage shall be a security for future liabilities, or advances, are forbidden by it. *Ib.*
8. No matter how absolute a conveyance may be on its face, if the intention is to take a security for a subsisting debt, or for money lent, the transac-

MORTGAGE, MORTGAGOR, MORTGAGEE.—*Continued.*

tion will be regarded as a mortgage, and treated as such. *Bank of Westminster* vs. *Whyte*, 508.

9. Though the defeasance was by an agreement resting in parol, still as between the parties, the deed, though absolute on its face, will be considered a mortgage. *Ib.*
10. In this case, the answer of the grantee confessing and admitting that a security merely was intended to be taken for a subsisting debt, the conveyance, though absolute on its face, was declared to be a mortgage. *Ib.*
11. A bill of sale, intended as a security for money loaned and to be loaned, must be considered as a mortgage, though absolute upon its face. *Ing* vs. *Brown & Brannan*, 521.
12. The proviso to the 2d section of the Act of 1825, ch. 203, that the grantee shall not have the benefit of the recording of a conveyance which, by any other instrument or writing, appears to have been intended only as a mortgage, unless such other instrument be also recorded therewith, does not apply to the case of a deed absolute upon its face, and where no other instrument was executed, though it was intended merely as a security for money loaned. *Ib.*
13. A. mortgaged to B. property on which C. held the vendor's lien. C. sells it, to pay the balance of his debt. HELD—

    That the proceeds of sale, after satisfying C.'s debts, are subject to the mortgage to B.; the rights of the mortgagee not being affected by turning the lands into money, the lien of the mortgage attaches upon the surplus proceeds of sale. *Stockett* vs. *Taylor*, 537.
14. The purchaser of an equity of redemption, sold under a proceeding against the mortgagor, has as clear a right to redeem as had the mortgagor himself. *Ib.*
15. Where a party purchases an equity of redemption at a sheriff's sale, made in legal form, he will not be discountenanced by the Court, when seeking to redeem, because of the inadequacy of the price paid by him. Where, under such circumstances, he runs the risk of buying a worthless title, he will be allowed the benefit of his purchase, if it results advantageously. *Ib.*

See PRACTICE IN CHANCERY, 4, 6, 7, 8.
CONSTRUCTION OF ACTS AND STATUTES, 1.
REGISTRATION OF DEEDS, &c., 3, 7, 8.
FIXTURES, 1 to 6.
IMPROVEMENTS, &c., 2.

MULTIFARIOUSNESS.

1. It is extremely difficult, if not impracticable, to lay down any general rule upon the subject of multifariousness. The Courts, in deciding such cases, are governed very much, if not exclusively, by considerations of convenience, in particular circumstances, avoiding the attempt to prescribe an inflexible rule. *Dunn* vs. *Cooper*, 46.
2. In deciding upon new cases as they arise, the Courts are not to disregard previous decisions; they should be consulted and followed, as far as may be safe, having due regard to considerations of general convenience, and

MULTIFARIOUSNESS.—*Continued.*

the advancement of justice, by avoiding, on the one hand, unnecessary litigation, and on the other, needless and oppressive expenses. *Ib.*

3. If a bill be liable to be dismissed for multifariousness, the rule is, that it must be dismissed absolutely, and *in toto*, and not retained to any extent, and made the foundation of partial relief. *Ib.*
4. A bill was filed by creditors attacking certain alleged fraudulent conveyances, and a receiver appointed; there was afterwards an amended bill, attacking other conveyances of the same grantor, and asking that the receiver might be ordered to sell certain property alleged to be in danger of loss; and, upon due notice served upon defendants, an order passed accordingly, and a large amount of property sold by the receiver. Two of the defendants to the original, and one to the amended bill, then came in, and demurred to the latter bill, on the ground of multifariousness. HELD—

That, under the special circumstances of this case, it would be most inconvenient to allow this demurrer to prevail, and that it should, therefore, be overruled. *Ib.*

MULTIPLICITY OF SUITS.

See PRACTICE IN CHANCERY, 32.

NOTICE.

1. Whatever is sufficient to put a party upon inquiry, is good notice in equity. *Ringgold* vs. *Bryan*, 488. *Stockett* vs. *Taylor*, 537.
2. The fact that complainant was in possession of part of the premises purchased, is sufficient to put the purchaser upon inquiry; and if he neglects to inform himself of the nature of complainant's rights, he must take the consequences of his neglect. *Ringgold* vs. *Bryan*, 488.
3. The complainant, who was the original vendor of the land, was in possession of part of it, when it was purchased from her vendee. HELD—

That this was sufficient to put the purchaser upon inquiry as to all the terms and conditions of the contract between the complainant and her vendor, and he must be considered as affected with notice of them all. *Ib.*

See PRACTICE IN CHANCERY, 5, 8, 68.
REGISTRATION OF DEEDS, 1, 2, 7, 8, 12, 13, 14.
HUSBAND AND WIFE, 14.
MECHANICS' LIEN, 6, 7, 8, 9.
SALES BY TRUSTEES, 2, 3.
INSOLVENT DEBTOR, 3, 4.
NOTICE TO CORPORATION.
VENDOR'S LIEN, 2.
EVIDENCE, 15.

NOTICE TO A CORPORATION.

1. Notice given to a director of an incorporated institution, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the institution. *The U. S. Ins. Co.* vs. *Shriver et al.*, 381.
2. But if the notice is given to him officially, for the purpose of being communicated to the board, although such notice should not be so communicated, the institution is bound by it. *Ib.*

ONUS PROBANDI.
See EVIDENCE, 1, 13.
PARTNERSHIP, PARTNERS, 1.
HUSBAND AND WIFE, 13.
ORPHANS COURT.
See PRACTICE IN CHANCERY, 14, 15, 18.
EVIDENCE, 1, 13.
GUARDIAN AND WARD.
RECEIVERS, 1, 2, 3.
ADMINISTRATOR PENDENTE LITE.
PARENT AND CHILD.
1. A father is entitled to the services of his son during the latter's minority, even though he does not live with him, and can maintain an action for such services, unless he has, by some act of his own, divested himself of his control over his son. *Bullett* vs. *Worthington*, 99.
PAROL AGREEMENT.
See MERGER, 1.
PART PERFORMANCE, 3.
PAROL CONTRACT.
See PRACTICE IN CHANCERY, 25, 26.
PAROL PROOF.
See PRACTICE IN CHANCERY, 13, 25.
EVIDENCE, 2, 5, 10, 14, 19, 23, 24.
SALES BY TRUSTEES, 1, 3.
TRUSTS, 2.
FRAUDULENT CONVEYANCES, 24.
PARTITION.
1. This Court will not sustain a bill for a partition, where the title of the complainant is denied, or not clearly established by the evidence; but will retain it for a reasonable time, to give him an opportunity to make out his title at law. *Boone* vs. *Boone*, 497.
2. The fact that the defendant relies upon lapse of time, and limitations founded on long possession, is a strong reason for leaving the complainant to make out his title at law. *Ib.*
PARTIES TO SUITS.
See PRACTICE IN CHANCERY, 9.
PATENTS.
See CONVERSION OF REALTY INTO PERSONALTY, 4.
PARTNERSHIP, PARTNERS.
1. Where a partner seeks to surcharge and falsify a settlement of the partnership affairs, upon the ground of error or mistake, the *onus probandi* is on him to show the errors, otherwise the Court will take it as a stated account, and establish it. *Lilly* vs. *Kroesen*, 83.
2. Each partner has the right of full and free access at all times to the books of the partnership. *Ib.*
3. Where two partners adjusted their partnership accounts, upon full, complete, and truthful data, ascertained the proportion of surplus to which each was entitled, and, by their written contract, deliberately prepared and signed, stipulated how, and from what source each should receive

PARTNERSHIP, PARTNERS.—*Continued.*

the sum due him, such a settlement cannot be surcharged or falsified on ground of error or mistake. *Ib.*

4. Where a contract of dissolution provided that the liquidating partner "should, from time to time, as assets may be received," pay to the other a certain sum, "to place him upon equal footing with" the former, and then divide the surplus in the proportion of one-third to the former and two-thirds to the latter, and the assets proved insufficient to make up this equality, it was HELD—

That the latter was entitled to recover from the former one-third of such deficiency, the former having received from the partnership before dissolution a certain sum, in regard to which the equality was to be made by payment to the latter of the sum stipulated in the contract of dissolution. *Ib.*

5. The contract also stipulated "that no interest is to be allowed or paid by or to either party from the date" of the contract. HELD—

That this refers to all sums that may be paid to either party from the date of the contract, including that required to make up the *equality* above referred to. *Ib.*

See EVIDENCE, 6.

PART PERFORMANCE.

1. Where the marriage itself is the only act of performance of a parol antenuptial agreement, that the *choses in action* of the wife should, in consideration of the marriage, become the property of the husband, if the agreement remains unexecuted, a Court of Equity has no power to decree its specific performance in opposition to the statute of frauds. *Gough* vs. *Crane*, 119.

2. Marriage itself, standing alone, is no part performance within the statute of frauds. *Ib.*

3. A parol agreement made in consideration of marriage is founded on a valuable consideration, and upon consummation of the marriage and delivery of the property in pursuance of the agreement, the case is taken out of the operation of the statute, and will be enforced in equity. *Ib.*

4. The circumstances of this case are distinguishable from those of the case of *Dugan et al.* vs. *Gittings et al.*, 3 *Gill*, 138, in essential particulars; there being here no legal testimony of mutual promises to marry, and none to bind the husband to the terms of the agreement as stated by the wife, and no clear evidence that the property was delivered in pursuance of the agreement. *Ib.*

5. To take a case out of the statute of frauds on the ground of part performance, the plaintiff must make out by clear and satisfactory proof the existence of the contract as charged in the bill, and the act of part performance must be of the identical contract set up by him. *Ib.*

6. The disinclination of Courts to make further inroads upon the statute, by excepting cases from its operation, is apparent in all the recent cases, and a firm determination exists to make no further relaxation of it. *Ib.*

7. Where a party is defending himself against the specific execution of a written contract, grounds of defence will be open to him which would not avail him if he as plaintiff were asking the aid of the Court. *Ib.*

8. Chancery, when called upon to coerce the specific performance of con-

PART PERFORMANCE.—*Continued.*

tracts, acts with less restraint than when exercising its ordinary jurisdiction, and will not interfere unless satisfied that the application is fair, just, and reasonable in all respects. *Ib.*

9. Where the representatives of the wife are asking a Court of Equity to direct the representatives of the husband, to deliver over to them the *choses in action* of the wife not reduced into possession by the husband in his lifetime, and the defence taken is part performance of a parol antenuptial agreement, the defendants should be held to the same clear, definite, and unequivocal proof of the contract set up in the answer, as if they were plaintiffs asking for its specific performance. *Ib.*

PERSONAL ESTATE.

See CHARGES UPON LANDS DEVISED, 1 to 6.

POST-NUPTIAL SETTLEMENT.

See FRAUDULENT CONVEYANCES, 30, 31.

PRACTICE IN CHANCERY.

1. The complainant, the holder of a mortgage from the defendant, dated the 9th of August, 1842, obtained a decree upon his bill filed on the 22d of May, 1847, against the mortgagor alone for the sale of the mortgaged property, and became the purchaser thereof at the sale made on the 7th of August, 1847. The Auditor, by his report of the 4th of December, 1847, applied $4483 85 of the proceeds to complainant's mortgage, $1274 15 to an elder judgment against the defendant, and $480 55 to W.'s judgment rendered in September, 1845, and the balance of $319 95 to the mortgagor. The report was confirmed on the 26th of July, 1848. On the 10th of September following, K., the holder of a mortgage on the same property, dated the 23d of January, 1843, filed his petition, stating the existence of his mortgage, and claiming the surplus proceeds after payment of liens prior to his own, and praying that the order ratifying the Auditor's report might be rescinded. The 9th of October was fixed by order of the Court for hearing this petition upon notice to the parties interested. E., the assignee of W.'s judgment, answered this petition, denying knowledge of the mortgage, and requiring proof of the allegations thereof. The petitioner was not present on the day fixed for the hearing, no proof had been taken by him, and no excuse offered for his failure so to do. The petition was then dismissed by an order passed on the 10th of October, 1849. Afterwards, on the 5th of November, 1849, K. filed a second petition, alleging that he had no notice of the answer of E. to his former petition, and, therefore, did not know what evidence he would be required to produce, and praying that he might be allowed now to produce evidence in support of his claim. HELD—

That it was the duty of the petitioner to have been present on the day fixed for the hearing of his first petition to take care of his rights, and having omitted this duty, he has no right now to call upon the Court a second time to relieve him; and that it would be establishing a most loose and inconvenient system of practice to grant his present application, and again open the order confirming the Auditor's report. *Ducker* vs. *Belt*, 13.

2. The Court cannot revoke the order passed on the 26th of July, upon a petition not filed until the 5th of November, because the July term had then

PRACTICE IN CHANCERY.—*Continued.*

expired, and the decree of the 26th of that month must be regarded as enrolled, and no longer liable to be heard upon petition. *Ib.*

3. If a decree be enrolled so that the cause cannot be reheard upon petition, there is no remedy but by a bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter discovered since. *Ib.*
4. The right of a junior mortgagee to come in upon the surplus proceeds of sale when the mortgaged property has been sold under a decree of this Court, to satisfy an elder mortgage, after payment of such elder mortgage, is well settled. *Ib.*
5. On the 31st of January, 1851, after the second petition of K. was dismissed, the complainant in the cause, by whom the property was purchased in 1847, filed a petition, asking that the order of the 26th of July, 1849, confirming the Auditor's report, might be revoked, and the money appropriated to pay K.'s mortgage, upon the ground, that he, as purchaser, was entitled to have the title disincumbered, and insisting that in his character of purchaser he cannot be regarded as a party to the proceedings, and, therefore, the orders and decrees of the Court therein are not binding upon him. HELD—

   That this application is not warranted by the decision of the Court of Appeals in the case of *Glenn* vs. *Clapp*, 11 *Gill & Johns.*, 1, and that the petitioner being the complainant, and having had a large proportion of the purchase-money applied to the payment of his own claim, he was affected *with notice* of the appropriation of a portion to the payment of W.'s judgment, and, therefore, cannot escape the consequences of his remissness in suffering upwards of three years to elapse before bringing forward his objection. *Ib.*
6. The rights of all incumbrancers, or persons having liens existing at the commencement of a suit for a foreclosure and sale, whether subsequent or prior in date to the plaintiff's mortgage, who are not made parties to the suit, cannot be impaired by the decree. *Ib.*
7. The Act of 1833, ch. 181, contemplates that the proceedings upon mortgages taken under it should be *ex parte*, until after the decree and sale, and that the propriety of the decree and the validity of the sale may be inquired into and contested after the order of ratification *nisi*, and before the final order. *Eichelberger* vs. *Harrison*, 39.
8. The mortgagor in such a mortgage cannot, therefore, complain that he had no notice of the application for a decree; neither can he prevent the sale under the decree, upon the ground that he is entitled to credits against the debt secured by the mortgage, which credits existed, if at all, prior to and at the time of its execution. *Ib.*
9. Upon a bill to foreclose a mortgage executed by husband and wife, the wife is a necessary party to the proceedings. *Johns* vs. *Reardon*, 57.
10. The fact that a defendant dies, after answering, leaving minor heirs, who are then made parties to the suit, does not and cannot vary the effect of the answer, and the complainant may avail himself of it at the hearing, to the same extent as if no such death had occurred. *Robertson* vs. *Parks*, 65.
11. Where a creditor's bill, besides the averments of the indebtedness of the

PRACTICE IN CHANCERY.—*Continued.*

deceased debtor, and that he left no personal estate, alleges that no letters of administration had been granted thereon, the admission of this allegation in the answer dispenses with the necessity of producing the proof that would be otherwise required. *Ib.*

12. A creditor's bill, after averring that the deceased debtor was in his lifetime seized of certain real estate, devised to him by his father, subject to a life estate of his mother therein, and that he died before his mother, leaving no personal property, alleged that the complainant is entitled to have his debt paid out of the real estate of the debtor in the hands of his heirs, or to which he may be entitled in remainder, as aforesaid. HELD—
That this allegation was sufficient to entitle the complainant to a decree for the sale of such real estate. *Ib.*
13. Where a deed has been traced into the hands of the complainant, the defendant cannot offer parol evidence of its contents, without first giving notice to the complainant to produce it. *Ib.*
14. Though an administrator, when called upon to account in Chancery, may exhibit with his answer and explain not only the accounts passed in the Orphans Court, but the vouchers for the credits therein allowed him, yet he cannot be compelled to do so. *Mitchell* vs. *Mitchell*, 71.
15. The vouchers are to be regarded as evidence, and need not be filed as part of the pleadings: to require them to be produced and explained in detail in the answer would render Chancery proceedings intolerably expensive and voluminous. *Ib.*
16. It is sufficient if they are produced before the Auditor when he is about to state the account, and their production then will upon application be enforced. *Ib.*
17. Where a bill alleges that an administrator has failed to *charge* himself with the hire of certain negroes, and the profits of leasehold property, and prays for a discovery of the full value, and true accounts, which he has, or ought to have received on account thereof, an exception to the answer upon the ground that it does not give this information will be sustained. *Ib.*
18. The accounts passed in the Orphans Court, with the light which the vouchers when produced will throw upon them, will not give the complainant the information called for by this charge of his bill. *Ib.*
19. Where a bill calls upon a defendant for the names and number of the negroes in his possession as administrator, an exception to the answer upon the ground that it does not give this information will be sustained. *Ib.*
20. A bill for the sale or partition of the real estate of an intestate must conform to the Act regulating descents, in order that the rights of election and preference secured to certain of the heirs may be enjoyed, and a demurrer to a bill for the want of this conformity will be sustained. *Roser* vs. *Slade*, 91.
21. Though the demurrer is sustained, yet the bill will not be dismissed, because the defects, in not making the averments required by the statute, may be cured by amendment. *Ib.*
22. Where a party is defending himself against the specific execution of a written contract, grounds of defence will be open to him which would

PRACTICE IN CHANCERY.—*Continued.*

not avail him if he as plaintiff were asking the aid of the Court. *Gough* vs. *Crane*, 119.

23. Chancery, when called upon to coerce the specific performance of contracts, acts with less restraint than when exercising its ordinary jurisdiction, and will not interfere unless satisfied that the application is fair, just, and reasonable in all respects. *Ib.*

24. Where the representatives of the wife are asking a Court of Equity to direct the representatives of the husband to deliver over to them the *choses in action* of the wife, not reduced into possession by the husband in his lifetime, and the defence taken is part performance of a parol antenuptial agreement, the defendants should be held to the same clear, definite, and unequivocal proof of the contract set up in the answer, as if they were plaintiffs asking for its specific performance. *Ib.*

25. In this State a Court of Equity will receive parol proof to reform a written contract, so as to make it correspond with the real intention of the parties, and then decree its specific execution. *Ib.*

26. But where the contract is by parol, no matter if the intention of the parties was ever so clearly expressed, it would still be void for want of writing, and no reformation of it by a Court of Equity can make it otherwise. *Ib.*

27. Under the prayer for general relief, the plaintiff may have any relief consistent with the specific relief prayed, which may be warranted by the allegations of the bill. *Dunnock* vs. *Dunnock*, 140.

28. Where the whole object of the bill and the special relief prayed for is a separate maintenance or alimony to the wife, so long as the separation between her and her husband may continue, it may well be doubted if a divorce, *a mensa et thoro*, could be granted under the prayer for general relief. *Ib.*

29. According to the practice in this State, an objection for the want of jurisdiction may be taken at the hearing, though not presented either by plea, answer, or demurrer. *Ib.*

30. The fact that the complainant had previously filed her bill in the equity side of the County Court for a divorce and alimony, is an insuperable objection to the Court of Chancery granting her relief upon her bill there for alimony. *Ib.*

31. Where two Courts have concurrent jurisdiction over the same subject-matter, the Court in which the suit is first commenced is entitled to retain it: the other has no authority to interfere, and will as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings. *Ib.*

32. Where a portion of the property in dispute was equitable, and the plaintiff's title could not therefore be asserted in a Court of law, and the number of tenants great, and endless litigation might, and probably would, ensue at law, the jurisdiction of equity may be maintained. *Cole* vs. *O'Neil*, 174.

33. In a case where the plaintiff shows equitable title to a part of the property in dispute, and a legal and equitable title to the rest, it being decided that the defendant has no title, legal or equitable, and where preservation of the property requires it, a receiver will be appointed. *Ib.*

34. Where a creditor seeks to offer new proof of his claim in the interval be-

PRACTICE IN CHANCERY.—*Continued.*

tween the final report of the Auditor, made under the directions of the Court, and its ratification, though it is not matter of course, yet he will be allowed to do so under circumstances which would not entitle him to the privilege after the report has been ratified. *White* vs. *Okisko Company*, 214.

35. The general rule is not to open the account after final ratification, on the application of a creditor whose claim has been first suspended, and ultimately rejected, for want of proof to sustain it; yet there may be cases in which it would and ought to be relaxed. *Ib.*
36. Though it may be competent to vacate upon petition the enrolment of a decree alleged to have been obtained by surprise, yet the general law of the Court is the other way, that a decree, after enrolment, cannot be reheard upon petition; the remedy is by bill of review. *Stewart* vs. *Beard*, 227.
37. An order ratifying the Auditor's account, distributing the proceeds of sale under a creditor's bill, cannot be vacated by petition after enrolment, on the ground that the petitioning creditor was not aware that there would be a surplus, after paying the preferred claim of the complainant. *Ib.*
38. The amount of the proceeds to be allowed a tenant for life in his interest in the property sold, depends upon his age and state of health at the time of sale. *Gambril* vs. *Gambril*, 259.
39. It is not necessary, that the party who applies to this Court to order a demise under the 5th section of the Act of 1831, ch. 311, should be the tenant in possession: the tenant of any particular estate, of full age, whether in possession or not, may apply under that section. *Hitch* vs. *Davis*, 262.
40. But the Court is not at liberty to order a demise under that Act, unless it is made to appear affirmatively, that the interest and advantage of all parties would be promoted by it. *Ib.*
41. A testator devised land, *in trust*, for his daughter for life, remainder to his granddaughter, the complainant, for life, remainder to the lawful issue of such granddaughter, in fee, if any such be living at the time of her death; but if none, then remainder to his daughter, M. D., for life, remainder in fee to her son, S. B. D. Upon a bill by the complainant, under the Act of 1831, ch. 311, to have the land leased, it appearing by the proof that those who might be ultimately entitled in remainder would be injured by such lease, the bill was dismissed. *Ib.*
42. The Court cannot, under the general prayer, grant relief not warranted by the allegations of the bill; the relief under the general prayer must be consistent with the case made by the bill, and its extent and character depend upon the facts charged in the bill. *Hitch* vs. *Davis*, 266.
43. A bill charged an executor and trustee with, 1st, neglect to pay rents and profits; 2d, failure to invest a $5,000 legacy; and 3d, refusal to deliver to complainant a certain note claimed by her as a gift from the testator. The relief prayed, was an account and payment of the legacy, and rents and profits, delivery up of the note, and if assets were not admitted, an account thereof, and their application, in due course of administration, and for *general relief*. HELD—

    That under this bill, the defendant could not be charged as executor with the note, as assets for the payment of the legacies of the will,

PRACTICE IN CHANCERY.—*Continued.*

exceptions having been filed to the sufficiency of the averments of the bill in this particular. *Ib.*

44. The bill, so far as it sought recovery for the note, was dismissed in May, 1851, but retained as to other matters; and in February, 1852, the cause was sent to the Auditor, for an account as to such other matters. HELD— That the Court cannot order an amendment, so as to present the question of the applicability of the note as assets. *Ib.*

45. A supplemental bill, after a decree, must not seek to vary the principles of the decree, but, taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the Court to give full effect to its decision. *O'Hara* vs. *Shepherd*, 306.

46. A supplemental bill may be filed as well after as before a decree; and if after, may be either in aid of the decree, that it may be carried into full execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it or by the defence made to it. *Ib.*

47. A supplemental bill, in the nature of a bill of review, cannot be filed without leave of the Court first obtained. *Ib.*

48. Upon a bill by a guardian against the ward's estate, a decree for an account was passed. Afterwards, and after the former guardian had resigned his office, the new guardian filed a supplemental bill, asking for a further account for a certain sum belonging to the same estate, for which it charged the administrator was responsible. HELD— That this supplemental bill did not make a new case, nor seek to vary the principle of the decree, and was properly filed by the new guardian. *Ib.*

49. Equity will relieve against a judgment at law, when its justice can be impeached by facts, or on grounds of which the party could not have availed himself at law, or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with any negligence or fraud on his own part. *Kent* vs. *Ricards*, 392.

50. An answer which does not deny the averments in which the equity of the bill consists, but states "that respondent does not believe, and cannot admit that the said attorney made any such arrangement or contract as set forth in the bill," is not sufficient to dissolve an injunction. *Ib.*

51. Where proof is taken, under an order of Court, and the notice was, that depositions would be taken on a certain day at a certain place, and they do not appear upon their face to have been taken at the *place* designated, they are not admissible in evidence. *Young* vs. *Mackall*, 398.

52. The statute of limitations may be pleaded, as a defence, at any time after the claim has been filed; or brought before the Court, either before the case has gone to the Auditor, or after he has made a report on it. *Ib.*

53. As a general rule, a special case must be shown before the Court will allow a defendant to amend his answer. *Williams* vs. *The Savage Manufacturing Co.*, 418.

54. Amendments will be allowed where new matter has come to the knowledge of defendant since his answer was filed, or in case of surprise, or

PRACTICE IN CHANCERY.—*Continued.*

mistake, or where an addition has been made to the draft of the answer after the defendant has perused it, and in some other special cases. *Ib.*

55. This unwillingness of the Courts to permit a defendant to change, or add to the grounds of defence set up in the first answer, is increased when the application is made after the opinion of the Court and the testimony have indicated how it may be modified to accomplish his purposes. *Ib.*

56. An order granting the complainant the right to surcharge and falsify an an account, was appealed from, and the Court of Appeals remanded the cause, under the Act of 1832, ch. 302, for the purpose of amending the pleadings and taking further testimony, and for further proceedings, and extended the right to surcharge and falsify to both parties, provided defendant, by amendment of his pleadings, placed himself in such an attitude as to warrant such extension. HELD—

57. That under this decision the defendant could amend his answer, so as to surcharge and falsify in respect to matters known to him at the time of filing his original answer. *Ib.*

58. The power to compel the production of books and papers, clearly belongs to this Court, but should be exercised with caution, and the party invoking it must designate, with a reasonable degree of certainty, the books and papers required, and the facts expected to be proved by them. *Ib.*

59. The application for the production of books stated, "that if they had been kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issues in the cause." No particular books were designated, and no facts expected to be proved by them stated. HELD—

60. That it would be an inconvenient and unjustifiable expansion of the rule upon such an application as this, to order all the books of a corporation to be brought into Court. *Ib.*

61. It is competent to this Court, after an account has been stated by the Auditor, in pursuance of directions, to review and reverse the decision, and to dismiss the bill on more mature consideration. *Ib.*

62. But where an order of this Court has been appealed from, and the Appellate Court has remanded the cause for further proceedings, without reversing or affirming such order, but in the order so remanding the cause has expressed its distinct approbation of the order appealed from, no question adjudicated by that order is open for examination in this Court, except those in regard to which additional evidence has been introduced. *Ib.*

63. As a general rule, the parties must be limited to the items of surcharge and falsification specified in the pleadings; this is indispensable, to prevent surprise. *Ib.*

64. If a deed is executed under suspicious circumstances, or is merely constructively fraudulent, this Court may, and should, permit it to stand as a security or indemnity to the grantee. *Ib.*

65. Equity, unlike a Court of law, which must pronounce one way or the other upon the validity of a deed, may adopt a milder course, and suffer it to stand, not as an absolute conveyance, but simply as a security for the sum really due. *Ib.*

66. In this case, a settlement between the complainant and the corporation was made, and the stock of the Company transferred to the latter for the

PRACTICE IN CHANCERY.—*Continued.*

amount found to be due by the former. Upon a bill by complainant attacking this settlement, it was decided, that it was not fraudulent in fact, and was allowed to stand; but leave was granted to surcharge and falsify the accounts upon which it was based, and they were accordingly corrected, and the amount due greatly reduced. HELD—

That the complainant has the right to demand the whole amount of stock transferred by him, upon his paying the amount really ascertained to be due from him, such transfer to stand merely as security for the sum actually due. *Ib.*

67. Where a term intervenes after the passage of an order, it is considered as enrolled, and cannot be reheard upon petition; the only remedy in such cases, is by bill of review for error appearing on its face, or new matter discovered since. *Notley Young's Estate*, 461.

68. The averment that his vendor was, at the time of the execution of the conveyance, seized, or pretended to be seized, and was in possession of the premises conveyed, is indispensably necessary to a plea by a defendant that he is a *bona fide* purchaser *without notice*. *Ringgold* vs. *Bryan*, 488.

69. An answer responsive to the bill cannot be overruled, unless contradicted by the testimony of two witnesses, or of one sustained by pregnant circumstances; circumstances standing alone will not destroy the answer.

70. A conveyance defectively executed, may be set up as a valid contract in equity, and a confirmatory deed will give it validity. *Ib.*

Ing vs. *Brown & Brannan*, 521.

See CREDITOR'S BILL, 2, 3.
SET-OFF.
CHARGES UPON LANDS DEVISED.
PART PERFORMANCE.
MULTIFARIOUSNESS.
APPEAL.
COMMISSIONS TO TRUSTEES.
SALES BY TRUSTEES.
JURISDICTION.
MORTGAGE, &c., 2.
GUARDIAN AND WARD, 6, 7.
IMPROVEMENTS, &c., 1, 2.
LUNATIC, LUNACY.
RECEIVERS.
INJUNCTION.
RULE FOR ASCERTAINING PRESENT VALUE OF LIFE ESTATE.
MERGER, 5.
PARTITION.
EVIDENCE, 2.
INSOLVENT DEBTOR, 2. TRUSTS, 3, 4.

PRINCIPAL AND SURETY.

See SUBSTITUTION, RIGHT OF, 1 to 5.

PROOF OF CLAIMS.

See PRACTICE IN CHANCERY, 34, 35.

PURCHASE.

See REMAINDERMEN.

PURCHASERS.
See REGISTRATION OF DEEDS, &c., 1, 2.
SALES BY TRUSTEES, 2, 3.
VENDOR, VENDEE, 1, 2.
PRACTICE IN CHANCERY, 68.
VENDOR'S LIEN, 2, 3.
MORTGAGE, &c., 15.

RECEIPTS IN DEEDS.
See EVIDENCE, 16, 17, 18.

RECEIVERS.
1. There is no doubt of the authority of this Court to protect the property of an intestate or testator, by appointing a receiver, pending a litigation in the Orphans Court for probate or administration. *In re Rachel Colvin, a lunatic*, 278.
2. The Court in such cases proceeds upon the ground that the property is in danger, because it may get into the hands of persons who have nothing to do with it, and it will not forbear to exercise the power to appoint a receiver, because the Orphans Court *may* provide for the collection of the effects of the deceased by granting letters *pendente lite*. *Ib.*
3. Chancery has no power to appoint a receiver *after* the grant of letters *pendente lite* by the Orphans Court, and if such receiver has been previously appointed, his powers cease upon the grant of such letters, and he will be discharged and directed to deliver over the property to such administrator. *Ib.*
4. A receiver has no rights whatever; he is but an officer of the Court; his appointment determines no right, and in no way affects the title of the property; his holding is the holding of the Court for him from whom the possession is taken, and he has no more right to ask for a revision of the order removing him than an entire stranger to the cause. *Ib.*
5. He is appointed on behalf of all parties, and not of the plaintiff or one defendant only, and when the title to the property has been ascertained, the receiver will be considered the receiver of the party so entitled. *Ib.*
6. The fact that a receiver has entered an appeal from the order discharging him, and filed an approved appeal bond, will not prevent this Court from enforcing by attachment its order of removal. *Ib.*

See PRACTICE IN CHANCERY, 33.
APPEAL, 3, 4.

REGISTRATION OF DEEDS.
1. The policy of the registry acts has nothing to do with the question of fraud; the operation of these acts may bind the title, but does not affect the conscience of the party taking the subsequent conveyance, whilst in cases which are not within those acts, the subsequent purchaser is only affected with such actual notice as would amount to fraud. *Johns* vs. *Reardon*, 57.
2. Subsequent purchasers are not affected by constructive notice of prior registered deeds and conveyances, unless they are such as are required by law to be registered: the doctrine of constructive notice has never been understood to extend to all deeds which may be *de facto* registered, but to such only as are authorized and required by law to be registered, and are duly registered in compliance with law. *Ib.*
3. Where an acknowledgment of a mortgage was defective in not being acknowledged before two justices of the peace of the county where the

REGISTRATION OF DEEDS.—*Continued.*

land was situated or the grantors resided, such defect cannot be cured by its registration in the county where the land lies, and notwithstanding such registration, it is wholly insufficient to pass title. *Ib.*

4. The 3d sec. of the Act of 1766, ch. 14, prescribes the form of the certificate to be given by the clerk of the county in which the acknowledgment is made; and when that form is pursued, either in terms or in words of equivalent import, the clerk of the county where the lands lie is authorized to enrol the deed: he cannot look out of the certificate, and decide whether the deed had or had not been acknowledged before persons authorized to take it. *Ib.*
5. But such enrolment does not give to the deed enrolled the attributes of a valid conveyance: the instrument still, when thus recorded, and the record thereof, both with reference to its efficacy to pass title, and to its influence upon the rights of others who may become interested in the property conveyed, depend upon whether it was executed and acknowledged according to law. *Ib.*
6. A certified copy of a deed cannot be more available than the original, the execution of the latter being first duly proved. *Ib.*
7. A mortgage of lands situated in Harford county, where also the grantors resided, was acknowledged before two justices of the peace of the city of Baltimore, whose qualification was duly certified by the clerk of Baltimore county, and the deed was recorded in Harford county. HELD—

   That this deed could not affect a subsequent mortgagee with constructive notice. *Ib.*
8. Whether the registry of this mortgage was constructive notice to the subsequent mortgagee, depends upon the admissibility in evidence of an official copy thereof from the records of Harford county. *Ib.*
9. Conveyances of equitable interests in lands, are within the Registry Acts; and the conveyance of such interest first recorded, must be preferred, unless the grantee had actual notice of the prior unregistered deed. *The U. S. Ins. Co.* vs. *Shriver, et al.*, 381.
10. The design of the Registry Acts was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. *Ib.*
11. The Act of 1831, ch. 205, sec. 3, authorizing bonds of conveyances to be recorded, does not, nor was it intended to, touch *conveyances* of the title, either legal or equitable; its object and effect is simply to authorize the registration of contracts to convey, and not conveyances. *Ib.*
12. If the subsequent mortgagee, whose deed is registered, had notice at the time of making his contract, of the prior unregistered deed, he shall not avail himself of the priority of his registry, to defeat it. *Ib.*
13. But such notice must have been received, or chargeable, when the second mortgage was executed; for if a right had vested, when the notice was received, he has then a right to try his speed in attaining a priority of registry. *Ib.*
14. The registered conveyance will not be postponed, unless the notice is so clearly proved, as to make it *fraudulent* in the purchaser, to take and register a conveyance in prejudice to the known title of the party holding the first conveyance. *Ib.*

See HUSBAND AND WIFE, 14.

RELATION, DOCTRINE OF.
See CONVERSION OF REALTY INTO PERSONALTY, 2 to 5.
RELEASE.
See GUARDIAN AND WARD, 2 to 7.
REMAINDERMEN.
The intervention of a freehold estate, between the possession and the remainder, prevents the owner of the latter from being seized, and, in the case of real estate, claimed by descent, would prevent the remainderman from becoming the stock of inheritance, though not if acquired by purchase. *Robertson* vs. *Parks*, 65.
RENT.
See FIXTURES, 8.
RENTS AND PROFITS.
See WILLS, &c., 5, 7, 9.
REPAIRS.
See IMPROVEMENTS, &c.
REPLEVIN.
See JURISDICTION, 4.
RESULTING TRUSTS.
See TRUSTS, 6, 7, 8.
RULES FOR FINDING PRESENT VALUE OF A LIFE INTEREST.
1. The ancient rule of the Court, fixing the allowance to a woman in lieu of dower, applies in all cases where it becomes necessary to ascertain the present value of a life interest. *Abercrombie* vs. *Riddle*, 320.
2. This rule having been sanctioned by the Court of Appeals, in the case of *Dorsey* vs. *Smith*, 7 *H. & J.*, 345, the authority of this Court to change it is questionable; and even if it could do so with propriety, the change should be prospective, and not so as to affect an actually depending case. *Ib.*
3. The Courts have no dispensing power over their rules and long established practice, and the party to whose prejudice an innovation upon the rule of Court is made, has a right to seek redress in the Appellate Court. *Ib.*
4. This rule has reference to the case of a healthy person, and where the *cestui que vie* is of infirm health, an abatement of the allowance must be made therefor; this is as imperatively required by the rule, as the ratio of distribution prescribed by it. *Ib.*
5. The *cestui que vie* was fifty-three years of age at the time of sale, and it was proved that her health was infirm, that her constitution never had been robust, and that her lungs were diseased. HELD,
That five years was a sufficiently large addition to her age, on account of ill health. *Ib.*
SALES.
See PRACTICE IN CHANCERY, 7, 8.
SALES BY TRUSTEES.
SALES BY TRUSTEES.
1. The advertisement is not the contract of the parties, and it is the constant practice of trustees to introduce other terms of sale, and make known to bidders at the time of the sale, facts and circumstances affecting the title or value of the property not mentioned in the advertisement, and parol proof of such facts is always admitted when it becomes necessary to re-

SALES BY TRUSTEES.—*Continued.*

sort to it to vacate or uphold the sale. *Farmers' Bank* vs. *Martin & Travers*, 224.

2. Where a purchaser knew of an incumbrance on the land, consisting of ground-rent in arrear, and the property was re-sold, he cannot be allowed a credit for such incumbrance paid by him. *Ib.*
3. The fact of such knowledge on the part of the purchaser may be proved by parol, though the advertisement of sale made no mention of ground-rent in arrear as an incumbrance on the property. *Ib.*
4. When a trustee deviates from the terms of the decree, objections to the ratifications of the sale will be allowed to prevail, which would be disregarded if urged against a sale in conformity with the decree; and no deviation is more obnoxious to objection than selling at private sale when the decree directs a public sale. *Latrobe* vs. *Hubert*, 375.
5. The trustee is the mere agent of the Court, and if he does not conform to the authority delegated to him, it is for the Court to say whether it will ratify his acts as such agent. *Ib.*
6. His instructions are contained in the decree, open to the inspection of all parties, and if he does not follow them, no one dealing with him has a right to complain if the Court should refuse to ratify his acts. *Ib.*
7. After he has put the property in market agreeably to the terms of the decree, and has failed to get an acceptable bid, he may sell at private sale, and if no objection be made, the Court will, after notice in the usual way, ratify the sale. *Ib.*
8. Objections merely capricious or arbitrary to such a private sale will not be allowed, but it is open to objections which would not prevail against a public sale. *Ib.*
9. The decree directed a public sale, and after one ineffectual effort to sell at such sale, the trustee sold the property at private sale at $17 per acre. It was proved that this sale was the result of a misunderstanding between the trustee and the mortgagor, whom the former had consulted and advised with in relation to the sale, and that $20 per acre could then and now be had for the property. HELD,

   That the sale ought not to be ratified. *Ib.*
10. Inadequacy of price is a stronger objection to a private sale than to a public one, when the decree directs the latter; and though the inadequacy in this case might not be sufficient, *per se*, to set the sale aside, yet this, added to the misunderstanding between the trustee and the mortgagor. Is sufficient to defeat it. *Ib.*
11. A decree directed the trustee to give "at least three weeks notice, inserted in some newspaper, &c., "and such other notice as he may think proper, of the time, place, and terms of sale." Upon the day duly appointed for the sale, the weather was inclement, no bidders were present, and there was no attempt to sell, and the trustee advertised the property to be sold four days thereafter, which advertisement appeared but once in the paper. HELD,

   That the failure to give the notice as prescribed by the decree, was a fatal objection to the validity of the sale. *Glenn* vs. *Wootten*, 514.
12. A departure from the regulation of the decree in an essential respect, without first attempting to sell in conformity with them, will always prevent a ratification, if objection be made. *Ib.*

SALES BY TRUSTEES.—*Continued.*

13. But after the trustee has once offered the property in the market, in the mode prescribed by the decree, and has been unable to sell it, he may dispose of it in a different mode, and then it is for the Court to say whether it will ratify the sale or not. *Ib.*
14. When the trustee sells in the mode and upon the terms prescribed by the decree, the Court has, by anticipation, bound itself to make good the sale, and will always do so, unless fraud, accident, surprise, mistake, or some cause is shown, manifesting gross want of discretion in the trustee. *Ib.*
15. But the faith of the Court is never pledged to ratify a sale made upon terms, or in a mode varying from the decree, even though the property has been once put in the market in exact conformity with it, and the attempt so to sell has been unsuccessful. *Ib.*
16. The direction in the decree to give public notice is most essential because without it competition can rarely be secured. *Ib.*

SEPARATE PROPERTY OF MARRIED WOMEN.

1. When a creditor proceeds under the 9th Section of the Act of 1842, ch. 293, to reach the property of a married woman, he must show that she earned it by her skill, industry, or personal labor, and must prove his claim according to the course of the attachment law, proceeding by way of attachment from the County Court. *Crane* vs. *Seymour*, 493.
2. The questions of fact and of law which may arise under this Act, and the proceedings it authorizes, are intended and peculiarly fitted for decision by Courts of law aided by juries. *Ib.*
3. The questions whether the property was earned by the married woman, and is liable for her debts, must be passed upon by a jury, and equity can only interfere to preserve the property from waste or destruction pending the litigation at law. *Ib.*
4. A peculiar and special mode of proceeding, to be pursued by creditors who attempt to reach the property of married women under this Act, is prescribed by the Act itself, and to this mode creditors are restricted. *Ib.*

SET-OFF.

1. A joint claim against the complainant and another cannot be set off against a debt due to the complainant individually. *Robertson* vs. *Parks*, 65.
2. The rule at law and in equity is the same, that the right of set-off must be reciprocal, and that mutual claims and such as are in the same right, can alone be set off. *Ib.*

SPECIFIC PERFORMANCE.

See PART PERFORMANCE, 1, 8, 9.
PRACTICE IN CHANCERY, 25.
INJUNCTION, 2.

STATUTE OF FRAUDS.

See PART PERFORMANCE, 1 to 7.
PRACTICE IN CHANCERY, 26.
TRUSTS, 2.

STOCKS.

See DIVIDENDS ON.
MERGER, 2 to 5.
PRACTICE IN CHANCERY, 66.

SUBSTITUTION, RIGHT OF.

1. A mortgage was assigned, and the equity of redemption conveyed by the mortgagor to D., who created liens upon the property by way of mortgage, and then executed and passed his promissory notes for the interest due on the original mortgage to the assignee thereof, with S. as endorser. These notes were paid at maturity by S., but no assignment of the mortgage was ever made to him, and the property was afterwards sold. HELD—That S. could not be subrogated to the rights of the original mortgagee as to the amount so paid by him. *Neptune Ins. Co.* vs. *Dorsey*, 334.
2. If by the payment of the money by S. an assignment *pro tanto* was effected by operation of law, he would, to all purpose and every effect, have been placed upon a footing of equality with the original mortgagee, and equally entitled with him to participate in the common security. *Ib.*
3. The Act of 1763, ch. 23, only confers the right to make the assignment authorized by it, upon the original creditor, and not upon the assignee of such creditor. *Ib.*
4. It is a clearly established principle in this State, that a surety, on paying the debt of the principal, has a right in a Court of Equity, to call upon the creditor for an assignment of the claim against the principal, and all liens which he has given the creditor. *Ib.*
5. But a surety can neither at law nor in equity call for such assignment, or be clothed by mere operation of law and upon principles of equity with the rights of an assignee, unless he has paid the *entire debt* of the creditor: a *pro tanto* assignment will not be allowed. *Ib.*

SUBROGATION.

See SUBSTITUTION, RIGHT OF.

SUPPLEMENTAL BILL.

See PRACTICE IN CHANCERY, 45 to 48.

SURCHARGE AND FALSIFICATION.

See PRACTICE IN CHANCERY, 56, 63.
PARTNERSHIP, &c., 1.

SURETY.

See SUBSTITUTION, RIGHT OF, 1 to 5.

TENANT FOR LIFE.

See IMPROVEMENTS, &c., 1.

TRESPASS.

See INJUNCTION, 2 to 13.

TROVER.

See JURISDICTION, 3.

TRUSTEES.

See COMMISSIONS TO. SALES BY.

TRUSTS.

1. If an heir or personal representative or devisee, whose interest would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances, either by words or silent assent, that his wishes shall be executed as though the provision were made, such assurance will raise a trust which will be enforced in equity on the ground of fraud. *Gaither* vs. *Gaither*, 158.
2. If such trust be denied by the heir or devisee, it may be proved by parol, though the statute of frauds be relied upon as a defence. *Ib.*

TRUSTS.—*Continued.*

3. But the Court will not interfere if there be any doubt or ambiguity in the evidence, and there is no case in which the party setting up such a provision has been successful, where a reasonable doubt in regard to the fact could be entertained. *Ib.*
4. In this case the will was executed in 1834, the testator died in 1836, and the person by whom the imputed assurance was alleged to be made died in 1849, and the bill was not filed until 1850. No reason for the delay was assigned, and the plaintiff entirely failed in producing clear and satisfactory evidence of the assurances set up in the bill. The Chancellor dismissed the bill. *Ib.*
5. A testator directed by his will, that his estate should be equally divided between his wife and daughter when the latter should attain the age of eighteen or marry; and until then, that his wife should occupy and enjoy the whole estate, to be applied to the proper maintenance of his family and the liberal education of his daughter. HELD—

   That this provision for the maintenance and education of the daughter raises a trust, which Chancery will enforce. *White* vs. *Donnell and Howard*, 526.
6. If an estate is purchased in the name of one, and the consideration-money is actually paid at the time by another, there is a resulting trust in favor of the party paying, provided the payment of the money be clearly proved. *Purdy* vs. *Purdy*, 547.
7. If only a part of the purchase-money is paid by a third party, there will be a resulting trust in his favor *pro tanto*, and the same doctrine applies to a joint purchase. *Ib.*
8. But it is indispensable to the creation of such a trust, that the money should be paid *at the time* of the purchase. *Ib.*

See LIMITATIONS, &c., 3, 4, 5.

VENDOR, VENDEE.

1. A vendor selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Falconer* vs. *Griffith*, 151.
2. Where a contract is made for the sale of an estate, equity considers the vendor as trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor. *Bowie* vs. *Berry*, 359.

See EVIDENCE, 22.
NOTICE, 3.

VENDOR'S LIEN.

1. Arbitrators, selected by children to ascertain their respective proportions of the real and personal estate of their father, made an award on the 18th of March, 1835, valuing said estates at $9,737 75; and that the share of B. S., one of the children, was $2,516 65; and that upon payment by G. S. of the shares of his co-heirs, they should convey to him the real estate and release the personalty. G. S. executed to B. S. his single bill for $2,163 27, without date, but bearing interest from the 29th of January, 1835; and on the 2d of May, 1836, B. S. gave to G. S. a receipt, stating that he had received of the latter "a *full consideration* for his entire interest in his late father's estate." HELD—

   That, in view of its terms, and the fact that B. S. retained in his pos-

VENDOR'S LIEN.—*Continued.*

session the single bill referred to, this receipt cannot have the effect to defeat the claim of B. S. for this debt, and he is, to the extent of his share of the realty, an unpaid vendor thereof, and has a right in equity to pursue the estate or its proceeds, as against the vendee or volunteers claiming under him or his judgment and general creditors. *Spalding* vs. *Brent et al.*, 411.

2. The purchase-money attaches to the land in the hands of the vendee as a trust; and the heirs of the vendee, and all other parties claiming under him or them, with notice, are treated as in the same predicament. *Ringgold* vs. *Bryan*, 488.
3. Where the vendee has sold the land to a *bona fide* purchaser without notice, if the latter has not paid the purchase-money, the original vendor may proceed against the estate, or the purchase-money in his hands; for in such a case, not having paid the purchase-money, he takes the land *cum onere*. *Ib.*
4. A judgment against the vendee gives to the judgment-creditor no estate in the land, but simply a lien upon it for the payment of his debt; and such lien being a general one, cannot affect or impair in any way the equitable lien of the vendor. *Ib.*

VOID, VOIDABLE.

See INFANCY, INFANTS, 1, 2, 5.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES, 4–12, 28, 29.
HUSBAND AND WIFE, 11, 12.

WIFE'S EQUITY.

See HUSBAND AND WIFE, 1–4.

WILLS, CONSTRUCTION OF, &c.,

1. A testator, after bequeathing certain pecuniary legacies to his four daughters, directed that his son *John* was "to hold the farm and have sufficient time to pay off the legacies," and then gave a pecuniary legacy to another son, *Joseph*. HELD—

   That all these legacies, including that to *Joseph*, are charges upon the real estate devised to *John*, and are to be paid, *pari passu*, out of the proceeds of the sale thereof. *Usilton* vs. *Usilton*, 36.
2. A testator bequeathed to his daughter the sum of two hundred and fifty dollars and two negro slaves, "and in case of her death, without issue, the property to go to her sisters." HELD—

   That the limitation over is void as to the two hundred and fifty dollars, being after an indefinite failure of issue. *Ib.*
3. The mere circumstance that the limitation over is to a person *in esse* will not of itself be sufficient, even as regards bequests of personalty, to restrict the words, "dying without issue," to mean a dying without issue at the death of the first legatee. *Ib.*
4. Where the limitation over after a bequest of personalty is, if the first legatee dies without "*leaving*" issue, the word "*leaving*" restricts the limitation over to a definite failure of issue. *Ib.*
5. A testator bequeathed his whole estate, with some small exceptions, to his wife for life, with remainder in fee to his two surviving children, and the children of a deceased daughter, and by a codicil, executed the same day, after reciting the devise to his wife, declared that he revoked "the

WILLS, CONSTRUCTION OF.—*Continued.*

same in part," and then bequeathed the "rents, issues, and profits," of a certain house and lot, immediately after his death, to his two surviving children, "the same to be applied towards their support and education." HELD—

That the intent of the testator, manifest upon the face of the will (construing the will and codicil as one instrument,) was simply to revoke the bequest to his wife, so far as the house was concerned, and to give the rents and profits of it for her life to his two surviving children, leaving the will after her death to operate upon it as upon the residue of his estate. *Boyle* vs. *Parker*, 42.

6. The will and codicil are to be construed together as one instrument, and are to be reconciled, as far as possible; but if irreconcilable, the codicil, as the last indication of the testator's mind, must prevail. *Ib.*
7. The devise of the profits of land does not, *ex vi termini*, pass the land, but only furnishes evidence of the intention of the testator that it shall pass, subject to be rebutted, of course, by the manifestation on the face of the will of a contrary intention. *Ib.*
8. In this case, nothing is said in the codicil about disturbing the limitation over to the children and grandchildren, and the will and codicil are easily reconciled by making the latter apply only to, and operate upon, that part of the will which relates to the wife. *Ib.*
9. The devise in this case being not of lands, but of their rents and profits, and the intent of the testator being manifest upon the face of the will that the land should not pass, the Act of 1825, ch. 119, does not apply. *Ib.*
10. That Act applies to devises of lands or real property in general terms, without words of perpetuity, or limitation, and gives the entire estate and interest of the testator, unless by devise over, or by words of limitation or otherwise, a contrary intention is indicated. *Ib.*
11. A testator devised lands to his son and his heirs, "provided, nevertheless, that if" his said son "should die without heirs lawfully begotten of his body," then over. HELD—

That the son took an estate in fee in the land devised to him, and which upon his dying intestate and without issue, descended to his surviving brothers and sisters, and the children of such as were deceased, as his heirs-at-law. *Roser* vs. *Slade*, 91.

12. A testatrix devised certain real estate to her daughter for life, remainder in fee to her three grandsons, naming them, "provided, nevertheless, that if either or any of my said grandsons *should die without issue*, then" the property "to descend to, and become the estate of the *survivor or survivors*." One of the devisees in remainder died without issue. HELD—

That the limitation over to the survivors is too remote, being after an indefinite failure of issue. *Jackson* vs. *Dashiel & Colston*, 257.

13. The words "*without issue*," in a will, when applied to depositions of real estate, mean *ex vi termini*, an indefinite failure of issue, if there is nothing in the will restricting their operation; and the circumstance that the limitation over is to a survivor in fee for life, will not have the effect to restrain the established legal meaning of the words.

See CHARGES UPON LANDS DEVISED, 1, 7, 8.
TRUSTS, 1 to 5.

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